EDITOR'S NOTE

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Title: Richard Thornburgh, et al., Appellants
v.
American College of Obstetricians and Gynecologists, et al.

Court: United States Court of Appeals for the Third Circuit

Counsel for appellant: Gordon, Andrew S.

Counsel for appellee: Zemaitis, Thomas E., Kolbert, Kathryn

try	Date	Note	Proceedings and Orders
1	Sep 26 1984	G	Statement as to jurisdiction filed.
3	Oct 15 1984		Order extending time to file response to jurisdictional statement until November 16, 1984.
4	Nov 16 1984		Motion of appellees American College of Ob & Gyn., et al. to dismiss or affirm filed.
6	Nov 30 1984	X	Reply brief of appellant Richard Thornburgh, et al. filed.
7	Nov 20 1984		REDISTRIBUTED. December 7, 1984
9	Dec 10 1984		REDISTRIBUTED. January 4, 1985
1	Jan 7 1985		REDISTRIBUTED. January 11, 1985
3	Feb 1 1985		REDISTRIBUTED. February 15, 1985
5	Mar 25 1985		REDISTRIBUTED. March 29, 1985
7	Apr 5 1985		REDISTRIBUTED. April 12, 1985
8	Apr 15 1985		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
0	May 6 1985		Order extending time to file brief of appellant on the merits until June 29, 1985.
2	May 6 1985		Order extending time to file brief of appellee on the merits until August 16, 1985.
3	Jun 7 1985		Record filed.
4	Jun 7 1985		Certified original record received. (Box).
5	Jun 11 1985		Record filed.
6	Jun 11 1985		Certified copy of appendix & partial C.A. proceedings received.
8	Jun 22 1985	D	Motion of Legal Defense Fund for Unborn Children for leave to file a brief as amicus curiae filed.
1	Jun 24 1985		Order further extending time to file brief of appellant on the merits until July 15, 1985.
2	Jun 28 1985		Brief amicus curiae of Watson D. Bowes, Jr., M.D., et al. filed.
3	Jul 5 1985		Application submitted by the Acting Solicitor General for leave to file a brief amicus curiae in excess of the page limitations and order denying same by Justice Stevens on July 9, 1985. (A-16)
4	Jul 5 1985		
5	Jul 12 1985		Brief amicus curiae of Olivia Gans, et al. filed.
6	Jul 12 1985		Brief amicus curiae of U.S. Catholic Conference filed.
7	Jun 22 1985	D	Motion of Alan Ernest to allow counsel to represent children unborn and born alive filed.
8	Jul 15 1985		Brief amicus curiae of United States filed. VIDED.

try	Date	Note	Proceedings and Orders
9	Jul 13 1985		Brief amicus curiae of National Right to Life Committee, Inc. filed.
0	Jul 15 1985		Brief amicus curiae of John D. Lane, M.D., et al. filed.
1	Jul 15 1985		Brief amicus curiae of U.S. Senator Gordon J. Humphrey, et al. filed.
2	Jul 15 1985		Joint appendix filed.
3	Jul 15 1985		Brief of appellants Richard Thornburgh, et al. filed.
4	Jul 11 1985		Application for leave to file amicus brief in excess of page limitation by Sen. Humphrey, et al., and order denying same by Stevens, J., 7/15/85.
5	Jul 11 1985		
6	Jul 5 1985		Application by acting S.G. for leave to file amicus curiae brief in excess of page limitations, and order denying same by Stevens, J., on 7/9/85
7	Jul 5 1985		
9	Jul 22 1985		Order extending time to file brief of appellee on the merits until August 30, 1985.
0	Aug 12 1985		Application for leave to file an amici curiae brief of the American Medical Assn., et al. in excess of the
1	Aug 12 1985		page limitation filed (A-129), and order granting same by Brennan, J., on August 14, 1985. The brief may not
2	Aug 12 1985		exceed 50 pages.
3	Aug 21 1985		Brief amicus curiae of American Psychological Association filed.
4	Aug 29 1985		Brief amicus curiae of National Abortion Rights Action League, et al. filed.
5	Aug 29 1985		Brief amicus curiae of National Organization for Women, et al. filed.
6	Aug 30 1985		Brief amicus curiae of Senator Bob Packwood, et al. filed.
7	Aug 30 1985		Brief amicus curiae of National Abortion Federation filed.
8	Aug 30 1985		Brief amicus curiae of Center for Constitutional Rights, et al. filed.
9	Aug 30 1985		Brief amicus curiae of Unitarian Universalist Assn., et al. filed.
0	Aug 30 1985		Brief amicus curiae of ACLU and PA ACLU, et al. filed.
1	Aug 30 1985		Brief amicus curiae of American Medical Association, et al. filed. VIDED.
2	Aug 30 1985		Brief amicus curiae of Attorney General of NY filed.
3	Aug 30 1985		Brief of appellees American College of Obstetricians, etc., et al. filed.
4	Aug 30 1985		Brief amicus curiae of Ad Hoc Group of Law Professors filed.
5	Jul 31 1985	D	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
7	Sep 11 1985		SET FOR ARGUMENT. Tuesday, November 5, 1985. (1st case).
8	Aug 8 1985		Opposition of appellees to motion of the Acting Solicitor General for leave to participate in filed.
9	Aug 30 1985	G	Motion of Women Lawyers' Association of Los Angeles, California, et al. for leave to file a brief as amici curiae filed.
0	Sep 16 1985		CIRCULATED.
1	Aug 30 1985	X	Brief amicus curiae of National Family Planning and Reproductive Health Assn. filed.
2	Sep 18 1985		Motion of Alan Ernest to allow counsel to represent children unborn and born alive DENIED.
3	Sep 18 1985		Motion of Legal Defense Fund for Unborn Children for leave to file a brief as amicus curiae DENIED.
4	Sep 18 1985		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
5	Oct 7 1985		Motion of Women Lawyers' Association of Los Angeles, California, et al. for leave to file a brief as amici curiae GRANTED.
6	Oct 15 1985	X	Reply brief of appellants Richard Thornburgh, et al. filed.

84-495

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CLERK

NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH,
H. ARNOLD MULLER,
HELLEN B. O'BANNON,
MICHAEL J. BROWNE,
WILLIAM R. DAVIS,
LEROY S. ZIMMERMAN, personally and in their official capacities,
and JOSEPH A. SMYTH, JR.,
personally and in his official capacity,
together with all others similarly situated,

Appellants

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M. D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D. O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees

On Appeal From the United States
Court of Appeals For The Third Circuit

JURISDICTIONAL STATEMENT

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31 pp

QUESTIONS PRESENTED

1. Whether a court of appeals properly may declare provisions of state law unconstitutional on appeal from a district court's disposition of a motion for preliminary injunction.

2. Whether the court of appeals misapplied the precedents of this Court in declaring unconstitutional numerous provisions of Pennsylvania's Abortion Control Act.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

RICHARD THORNBURGH,
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Appellants

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Appellees

On Appeal From The United States
Court of Appeals For The Third Circuit

The Attorney General of the Commonwealth

of Pennsylvania, on behalf of

the appellants named above,

hereby appeals from the judgment

of the court of appeals entered in this case.

OPINIONS BELOW

The opinion of the court of appeals, including the statements dissenting from the denial of rehearing in banc (App.[1] 3a - 173a), is reported at 737 F.2d 283. The opinion of the district court (App. 174a - 272a) is reported at 552 F.Supp. 791.

JURISDICTION

The judgment of the court of appeals (App. 153a - 154a) holding unconstitutional 18 Pa. Cons. Stat. §§3205, 3206, 3208, 3210(b) and (c), 3211 and 3214(a),(b) and (h) was entered on May 31, 1984. A timely petition for rehearing in banc was denied by order entered on June 28, 1984. App. 155a - 156a. A notice of appeal to this Court (App. 1a - 2a) was filed on September 17, 1984.

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[1]"App." refers to the appendix to this jurisdictional statement.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Pennsylvania statute at issue here are reproduced as an appendix to the opinion of the court of appeals (App. 90a - 132a) and in the appendix to this jurisdictional statement. App. 279a.

STATEMENT

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit in which the court, in the course of reviewing a district court decision denying almost entirely a preliminary injunction,[2] held unconstitutional numerous provisions of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983) (hereinafter "the Act" or "the Pennsylvania Act"). Among the provisions stricken by the court of appeals were those dealing with informed consent (Section 3205), parental consent or judicial approval for minors (Section 3206), printed information (Section 3208), abortions after viability (Section 3210(b, and (c)), and reporting requirements for abortion providers (Sections 3211(c) and 3214(a)(b) and (h)).[3]

Proceedings were commenced in the United States District Court for the Eastern District of Pennsylvania on October 2, 1982, when the appellees[4] filed an action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 in which they alleged that the Act in its entirety violated various consti-

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[2]The district court preliminarily enjoined only the requirement that 24 hours expire between the time a woman receives certain specified information and performance of the abortion, 18 Pa. Cons. Stat. Ann. §3205(a). (App. 270a).

[3]The court of appeals also struck down Section 3215(e) relating to coverage for abortion in insurance policies. Appellants are not appealing that ruling at this time.

[4]The plaintiffs below (appellees in this Court) were the American College of Obstetricians and Gynecologists, Pennsylvania Section, individual physicians who perform abortions, abortion clinics, clergymen and one woman who desires to purchase comprehensive health insurance.

tutional provisions.[5] With the Act scheduled to go into effect on December 8, 1982, appellees filed a motion for preliminary injunction on October 29, 1982. On November 18, 1982, the district court ordered the parties, solely for purposes of a preliminary injunction hearing to be held on December 2, to submit by November 30 a stipulation of uncontested facts; a comprehensive statement of contested facts, with the proviso that "no party may contest a fact unless it is prepared to present evidence regarding that fact

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[5]Named as defendants below (appellants here) were Governor Thornburgh, Health Secretary Muller, Public Welfare Secretary O'Bannon, Insurance Commissioner Browne, Commonwealth Secretary Davis, Attorney General Zimmerman and Montgomery County District Attorney Smyth. Defendants Thornburgh and O'Bannon filed a motion to dismiss themselves as defendants. Appellees stipulated to the dismissal of Thornburgh, but the district court has issued no order on the motion to dismiss O'Bannon.

at the preliminary injunction hearing"; and, a list of witnesses, together with a brief statement of the testimony to be preserted by each witness. App. 274a - 278a.

In view of the brief time available to prepare for the hearing and to meet the requirements of the judge's order outlined above, the parties agreed to a stipulation of facts solely for purposes of the motion for preliminary injunction. See App. 176a, n.1. At the hearing on December 2 no testimony was presented. App. 177a.

Following the district court's December 7 order denying almost entirely the preliminary injunction, on December 9 the court of appeals, on motion of appellees, enjoined enforcement of the entire Act pending appeal. After

argument and reargument of the appeals, on May 31, 1984,[6] the court of appeals, in a split decision, held that numerous provisions of the Act were unconstitutional. A petition for rehearing in banc was denied on June 28, 1984, with four judges dissenting.

In her majority opinion for the court Judge Sloviter held first that, although the appeal was from a preliminary injunction order, "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields

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[6]After expedited briefing and argument, the court of appeals ordered that the appeal be held pending decisions by this Court in City of Akron v. Akron Center for Reproductive Health, Inc. Nos. 81-746 and 1172; Planned Parenthood Assn. of Kansas City, Mos., Inc. v. Ashcroft, Nos. 81-1255 and 1623; and, Simopolous v. Virginia, No. 81-185, which were then pending before this Court. Following decisions in those cases on June 15, 1983, the court of appeals ordered that supplemental briefs be filed and reargument was held on November 21, 1983.

to our plenary scope of review as to the applicable law." App. 21a. The majority then proceeded to hold unconstitutional eight provisions of the Act. Chief Judge Seitz dissented in part, disagreeing with the majority's holdings of unconstitutionality as to Sections 3205(a)(2); 3208; 3210(c); 3211; and, 3214(a),(b) and (h). App. 132a - 152a.

The Questions Are Substantial

The court of appeals has declared unconstitutional numerous significant provisions of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983), and has also suggested to the appellees additional arguments which may, in the court's view, render other provisions of the Act vulnerable to attack.[7] These rulings are incorrect in light of precedents from this Court, many of which are of recent origin. More fundamentally, however, the decision of the court of appeals majority is a stark example of judicial excess which calls out for this Court's correction.

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[7]For examples of the majority's improper reaching out for issues and claims not raised by the appellees see Chief Judge Seitz's partial dissent at App. 141a - 143a, 146a.

1. Until now we had thought it well-settled that the question before the court on a motion for preliminary injunction is whether the plaintiff has demonstrated "that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits," Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); the question on appeal then is whether the trial court abused its discretion in granting or denying the motion. Id., at 932. As this Court has held squarely, it is beyond a court's province when examining a preliminary injunction motion to declare a statute unconstitutional. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940); see also Withrow v. Larkin, 421 U.S. 35, 43 (1975).

Quite obviously, the court of appeals here, in declaring numerous

provisions of state law unconstitutional in the course of examining a district court's ruling on a motion for preliminary injunction, has violated in as blatant a manner as possible the permissible scope of its review as prescribed in Doran and Mayo. As if this immoderation were not enough, the court of appeals majority, veiling only thinly its distaste for the subject matter of this legislation[8], offered

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[8]For example, in the majority opinion, the court of appeals felt compelled to note that "[w]e may not inquire as to whether the Pennsylvania legislature's intent [unexpressed] to restrict a pregnant woman's fundamental right to choose an abortion was so 'fundamental an inducement' as to invalidate the entire Act . . . ." App. 31a. (citation omitted); and, to "overlook [ ] what may reasonably be deemed to be a pervasive invalid intent." App. 32a. In its conclusion, the court's majority also chided the legislature for passing a statute "which it had been advised skirted constitutional limits." App. 86a.

hints to the appellees as to how they might successfully mount further challenges in the district court.[9]

The court of appeals' reliance on what it termed "an unusually complete factual record" (App. 21a) was misplaced. This Court again has squarely held that an appellate court reviewing a preliminary injunction ruling should "intimate no view as to the ultimate merits" of the case

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9 For example, the court's majority upheld Sections 3207(b) (Abortion Facilities, Reports) and 3210(a) (Abortion After Viability, Prohibition), but opined that these provisions would be invalid if only the appellees can produce evidence that physicians will be "chilled" by their provisions. App. 57a, 58a, 68a. As Chief Judge Seitz correctly noted in his partial dissent, the very purpose of a statute of this sort is to "chill" illegal conduct. App. 146a. The majority's unprecedented suggestions to appellees improperly constrain appellants' ability to defend these provisions at trial. We request, therefore, that in the course of reviewing this appeal, the Court express disapproval of these uncalled for, and erroneous, hints.

precisely because the litigants have "a limited time . . . to assemble evidence and prepare their arguments." Brown v. Chote, 411 U.S. 452, 457 (1973). In fact, as we detailed earlier, supra p. 6 - 7, appellants were constrained to comply with the district court's order to assemble their proof within about two weeks and to not contest any fact unless prepared to offer testimony in rebuttal. App. 274a -278a. While the district court's order may have been necessary under the circumstances, the concessions it forced appellants to make should not bind them on the ultimate disposition of the cause. Indeed, the district court's procedural order, the stipulations of fact and the court's ruling were carefully limited to the preliminary injunction motion. App. 274a - 278a, 176a, n.1.

Unquestionably, the court of

appeals' disposition of this case seriously prejudices appellants' ability to defend at a final hearing the constitutionality of the provisions deemed invalid by the court. The district court is bound by those rulings and might even deny appellants the opportunity to offer evidence supporting the validity of these now-stricken sections of the statute. Entirely aside from the court's errors in its constitutional analysis, which we highlight below, the decision of the court of appeals to reach out far beyond the scope of its review presents substantial and important questions meriting this Court's review.[10]

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[10]In light of the court of appeals' obvious error in determining the scope of its review, the court may wish to consider summary reversal on this ground alone.

2. In Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, No. 81-185 (June 15, 1983), the Court upheld a statute which, like Section 3210(c) of the Pennsylvania Act, requires the attendance of a second physician during post-viability abortions. As Chief Judge Seitz noted in his partial dissenting opinion below (App. 144a), the Pennsylvania statute is constitutional under Ashcroft.

There was in Ashcroft no single opinion representing the views of a majority of the court on Missouri's second physician requirement. Justice Powell, in an opinion joined by the Chief Justice, concluded that a second physician requirement is constitutional if the statute provides an exception to the requirement for medical emergencies. Slip op. at 8, n. 8.

Although the Missouri statute contained "no clearly expressed exception on the face of the statute for medical emergencies," Justice Powell construed statutory language qualifying the physician's duty to the child by providing that his action "not pose an increased risk to the life or health of the woman" as an exception for medical emergencies. Ibid. The three remaining Justices who approved of the second physician requirement apparently found no need for a medical emergency exception. Opinion of Justice O'Connor, Slip op., at 2.[11] Thus in light of

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[11]Four Justices, in an opinion authored by Justice Blackmun, concluded that a second physician provision was invalid generally and because the medical emergency exception was not express. Slip op. at 6-10.

Ashcroft, a second physician requirement is constitutional if it provides, although perhaps not expressly, that the requirement is not intended to put the pregnant woman's life or health at risk.

Pennsylvania's statute clearly meets these requirements. In terms far more explicit than the Missouri statute at issue in Ashcroft, Pennsylvania's law provides, "It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he concluded in good faith, in his best medical judgment . . . that the abortion was necessary to preserve maternal life or health." 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983) (emphasis added). The court of appeals majority's decision to ignore the language of the statute conflicts with the decision in Ashcroft and

(1976), the Court unanimously upheld a requirement that physicians compile "relevant health and life data." Id., at 87. As Chief Judge Seitz noted in his partial dissent, the Missouri statute was general in its terms and it is impossible to determine, as the majority below seems to have done, whether Pennsylvania's requirements are more or less substantial than Missouri's. App. 147a. Chief Judge Seitz correctly concluded (a) that the requested information, on its face, clearly is relevant life and health data which physicians already obtain as a matter of course or which can be "easily obtained through simple questions or observation," App. 148a, and (b) that the magnitude of any increase in costs is speculative. App. 149a.

More recently, in Ashcroft, the

Court reaffirmed Danforth in upholding Missouri's requirement that a pathology report be filed after each abortion. Despite claims of increased cost, the Court found that the burden created by such a regulation is "relatively insignificant." Slip op. at 14. The Court observed that these reports "in concert with abortion complication reports, provide a statistical basis for studying those complications." Slip op. at 11. Proper application of these principles requires reversal of the court of appeals' declaration of unconstitutionality.

Section 3214(a) and (h) require reports to contain routine statistical information regarding abortions and complications from abortions. The sheer volume of statistics which this Court has reviewed in its decisions on this

subject, see City of Akron v. Akron Center for Reproductive Health, Inc., No. 81-746 (June 15, 1983), slip op., at 18-20; Ashcroft, slip op. at 6-9; Roe v. Wade, 410 U.S. 113, 149 (1973), underscores the need for this information. Under these circumstances, the appellees' utter failure to demonstrate any effect from the reporting requirements, including the inability to show any quantifiable, substantial increase in the price of an abortion, renders the ruling of the court of appeals in direct conflict with the prior decisions of this Court. The question is substantial and merits this Court's review.[12]

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[12]In the course of striking down the reporting requirements, the court of appeals also struck down Section 3211, which requires that reports be filed concerning the physician's determination whether a

FOOTNOTE continued to next page.

4. Section 3205(c)(2) of the Act requires the physician or his agent to inform the woman that medical assistance benefits may be available for prenatal and child care; that the father is liable to assist in the support of his child; and, that the woman has the option to review printed materials which describe the characteristics of the unborn child in objective, non-judgmental, scientifically accurate terms and which list agencies offering

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FOOTNOTE cont'd from previous page.

fetus is viable. The reasons which support the reporting requirements generally, together with the state's compelling interest in protecting a viable fetus, support this provision as well.

Moreover, in its shotgun attack on the statute, the majority brushed over the fact that it was also striking down the requirement of Section 3211 that physicians determine whether a fetus is viable - a requirement not challenged by appellees and clearly constitutional on its face.

assistance to women during pregnancy and after birth of the child.[13] The court of appeals struck down this provision despite this Court's conclusion in Akron that information of this type is "not objectionable." Slip op. at 27, n.37.

Section 3205(a)(1) requires that a woman be informed of the name of the physician who will perform the abortion; the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable; "medically accurate" information on the risks

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[13]Section 3205(a)(2) also requires that the specified information be provided to the woman 24 hours before the abortion is performed. The 24-hour requirement is not pressed here by appellants in light of the Court's ruling in Akron. Nevertheless, as with all challenged provisions of the Act, appellants wish to preserve their right to offer evidence in support of the 24-hour requirement at trial.

of the particular procedure to be employed; the probable gestational age of the unborn child; and, the medical risks associated with carrying the child to term.[14] Again, these provisions, designed as they are only to inform a woman of facts relevant to the abortion decision, are the types of information approved by this Court. See Akron, slip op. at 27, n.37; Planned Parenthood Assn. v. Fitzpatrick, 401 F.Supp. 554, 586-588 (E.D. Pa. 1975) (three judge court), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

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[14]Section 3205(a)(1) also contains 24-hour and physician-only counseling provisions found objectionable by the Court in Akron and by the court of appeals here. We press no challenges to those holdings at this time. It is clear that those provisions are severable from the remainder of Section 3205(a)(1) in view of the Act's broad severability clause. See Act No. 1982-138,§5, 1982 Pa. Legis. Serv. 750, 794 (Purdon), App. 279a.

As Judge Weis pointed out dissenting from the denial of rehearing in banc, the majority ignored the significant differences between Pennsylvania's statute and the ordinance struck down in Akron. App. 163a - 164a. Pennsylvania's statute does not contain the "parade of horribles" found objectionable in Akron, slip op., at 26. Indeed, it is scrupulous in its effort to assure that all information is non-judgmental and medically accurate. The majority below misapplied this Court's precedents in striking down Pennsylvania's informed consent provisions.

Similarly incongruous is the court of appeals' holding that Section 3208, which provides for the printing of materials describing the agencies available to help needy mothers and the characteristics of unborn children, is

unconstitutional. App. 58a. This provision was not challenged below and, as Chief Judge Seitz noted in his dissent, it is not inextricably intertwined with the informed consent provisions, nor is it itself unconstitutional. App. 136a - 141a. These errors present substantial questions justifying this Court's review.

5. Section 3206 of Pennsylvania's Act requires that unemancipated and immature minors obtain parental consent or judicial approval prior to obtaining an abortion. 18 Pa. Cons. Stat. Ann. §3206. The court of appeals correctly held that Pennsylvania's statute conforms to the standards for such legislation prescribed by this Court in Akron, slip op. at 20-23; Ashcroft, slip op., at 14-17 (Powell, J.); and, Bellotti v.

Baird, 443 U.S. 622, 640-642 (plurality opinion for four Justices), 656-657 (White, J., dissenting). Nevertheless, the court enjoined enforcement of Section 3206, apparently holding that the section is unconstitutional until the Pennsylvania Supreme Court issues detailed rules on the confidentiality and expedition of judicial approval proceedings. App. 56a.

In holding as it did, the court of appeals again ignored this Court's rulings. The court of appeals has failed, as this Court repeatedly has directed it, to give weight to the state courts' obligation to follow the statute's (and the Constitution's) directives that these proceedings be carried out confidentially and with dispatch. Ashcroft, slip op., at 14-15, n.16; Bellotti, 443 U.S., at 645, n.25. In fact, the court of appeals chose to

disregard the Court's holdings in Ashcroft and Bellotti that the absence of state court rules does not invalidate minor consent statutes which provide generally for expedited, confidential proceedings. Ibid.

Moreover, Pennsylvania's guidelines are not as amorphous as the court of appeals suggests. The statute itself requires a decision on a petition for court approval within three days and provides for "an expedited confidential appeal." 18 Pa. Cons. Stat. Ann. §3206(f), (h). As the court of appeals noted (App. 55a - 56a), the Pennsylvania's Chief Justice has instructed the local courts to apply the adoption rules, which contain provisions for confidentiality. See 23 Pa. Cons. Stat. Ann. §§2905-2906 (Purdon 1983). This action has been reinforced by the adoption of Rule of Judicial Administration 2157[8], which incorporates the confidentiality provisions of the Orphans' Court Rules[9] and establishes

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8 Rule of Judicial Administration 2157 provides, as follows:

Rule 2157. Proceedings Pursuant to Abortion Control [Act]

Jurisdiction in cases filed pursuant to Section 3206, Act No. 1982-138, known as the "Abortion Control Act," shall be in the Orphans' Court Division of the Court of Common Pleas, except in Philadelphia, where cases involving minors shall be heard in the Family Court Division. All proceedings under the Act shall be in conformity with Supreme Court Orphans' Court Rule 15.7.

9 Orphans' Court Rule 15.7 provides, as follows:

15.7. Impounding: docket entries; report; privacy.

(a) All proceedings shall be impounded, docket entries made, reports made to the Department of Public Welfare, and certificates of adoption issued as provided in Sections 505, 506, 507 and 508, respectively, of the Adoption Act.

FOOTNOTE cont'd on next page.

the appropriate jurisdiction for proceedings under the Act. These provisions, together with the state courts' statutory and constitutional duties, more than satisfy the requirements that this Court has imposed on judicial proceedings for minors' abortions.

The court of appeals' flagrant disregard of both the facts and the law relating to judicial proceedings for

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FOOTNOTE cont'd from previous page.

> (b) The name or names of the natural parents and the name or names of the child before adoption shall not be entered on any docket which is subject to public inspection.
>
> (c) No decision under the Adoption Act of any hearing judge or appellate court publicly reported or in any other way made available to the public by the court shall disclose the identity of the individual parties.

approval of minors' requests for abortions presents yet another substantial question meriting this Court's review.

6. The court of appeals held unconstitutional Section 3210(b) of the Act which requires a physician performing an abortion on a viable fetus to use the abortion method most likely to produce a live birth, unless that method "would produce a significantly greater medical risk to the life or health of the pregnant woman." The court properly noted that this type of provision is invalid only if it requires the pregnant woman to sacrifice her life or health for the viable fetus. App. 69a. See Colautti v. Franklin, 439 U.S. 379, 400 (1979); see also Ashcroft, slip op., at 8-9, n.8 (second physician requirement for abortion of viable fetus

permissible provided pregnant woman's life and health not endangered). But the court of appeals failed to follow the lead of the district court in construing the statute so as to preserve its constitution-

ality. Compare App. 70a, with App. 246a- 249a.

At issue is the term "significantly," and whether that term should be construed to mean, in the context of this statute, a "meaningful" increased risk (as appellants urged and the district court concluded) or a "substantial" increased risk (as appellees argued). This Court has stated time and again that federal courts are required to construe state statutes in such a manner as to dispel, not create, constitutional problems. Ashcroft, slip op. at 16; United States v. Harris, 347 U.S. 612, 618 (1954).

The district court observed, "Websters' Third New International Dictionary defines significant as 'having meaning,' 'having or likely to have influence or effect, 'and probably caused by something other than chance.'" App. 248a. Under this view of the critical term, the statute would not impose a sacrifice upon the pregnant woman's life or health.

The district court's construction of the statute, which certainly was a permissible one, properly respected this Court's direction to avoid constitutional problems. Yet, the court of appeals rejected the district court's constitutional construction of the statute in favor of an unconstitutional construction. In short, the court of appeals again consciously and directly violated this Court's directives. This question is substantial and calls for this Court's review.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Date: September 24, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,	:	
Appellants, Cross-Appellees	:	
	:	NO. 82-1785
V.	:	
	:	NO. 82-1846
RICHARD THORNBURGH, et al.,	:	
Appellees, Cross-Appellants	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Thornburgh, H. Arnold Muller, Helen O'Bannon, Michael J. Browne, William R. Davis, LeRoy S. Zimmerman and Joseph A. Smyth, Jr., appellees, cross-appellants in these cases, hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Third Circuit dated

May 31, 1984, rehearing denied by order dated June 28, 1984, reversing the judgment of the United States District Court for the Eastern District of Pennsylvania dated December 7, 1982.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

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Date: September , 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1785, 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all other similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellants in No. 82-1785
and Cross-Appellees
in Nos. 82-1846

VS.

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally, and in his official capacity, together with all others similarly situated,

Appellees in No. 82-1785
and Cross-Appellants
in No. 82-1846

ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 82-4336)

Originally Argued: March 11, 1983
Before: SEITZ, Chief Judge, HIGGINBOTHAM, and SLOVITER, Circuit Judges

Reargued Before Original Panel:
November 21, 1983

(Opinion filed May 21, 1984)

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OPINION OF THE COURT

SLOVITER, Circuit Judge.

The Supreme Court has firmly established that the fundamental constitutional protection of privacy encompasses a woman's right to obtain an abortion. At issue before us is the appellants' contention that Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983), impermissibly circumscribes that right. We examine that contention by considering the legislative background of the 1982 Act,

the procedural posture of this case, the applicable Supreme Court decisions, and a section-by-section analysis of the Pennsylvania Act. We conclude that most of the provisions attached by appellants are unconstitutional as a matter of law.

I.

LEGISLATIVE BACKGROUND OF THE 1982 ABORTION CONTROL ACT

Until Pennsylvania enacted its first comprehensive statute dealing with abortion, the relevant law provided that any person who took steps aimed at "unlawfully" causing a woman's miscarriage committed a felony punishable by fine and imprisonment. See Penal Code of 1939, No. 375, § 718, 1939 Pa. Laws 872, 958, saved from repeal, Crimes Code of 1972, No. 334, § 5, 1972 Pa. Laws 1482, 1611 (repealed 1974).[1] Because the statute did not define

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[1]A version identical except as to penalty was contained in the Penal Code of 1860, No. 374, § 88, 1860 Pa. Laws 382, 404-05. In 1850, the Pennsylvania Supreme Court held that the attempt to cause miscarriage was a crime at common law. See, e.g., Mills v. Commonwealth, 13 Pa. 631, 633 (1850)("It is a flagrant crime at common law to

(Footnote 1 continued next page).

"unlawfully" and did not specify whether therapeutic abortions were excepted, it was unclear whether a physician in Pennsylvania could legally terminate a pregnancy that involved substantial risk to the physical or mental health of the mother, although other jurisdictions permitted such abortions. See Trout, Therapeutic Abortion Laws Need Therapy, 37 Temp. L.Q. 172, 184-86 (1964); Note, The Antiquated Abortion Laws, 34 Temp. L.Q. 146, 150-51 (1961).

Footnote continued from previous page.

attempt to procure the miscarriage or abortion of the woman . . . . It is a crime against nature which obstructs the fountain of life, and therefore is punished").

Other provisions of the Penal Code imposed a more severe penalty for abortions that caused a woman's death. Penal Code of 1939, § 719, and made it a crime for a woman to conceal the death of a bastard child. Id., § 720.

The landmark decision in Roe v. Wade, 410 U.S. 113 (1973), invalidated statutes such as Pennsylvania's because a general prohibition of abortions violated a woman's fundamental constitutional rights to privacy. See also Doe v. Bolton, 410 U.S. 179 (1973). The following year, Pennsylvania enacted the state's first comprehensive "Abortion Control Act" over the governor's veto. Abortion Control Act of 1974, No. 209, 1974 Pa. Laws 639 (amended 1978, repealed 1982). Many of the provisions of that Act, such as those requiring spousal or parental consent to an abortion, banning advertising of abortion procedures, and enacting a vague criminal standard governing abortions at

"viability," were held unconstitutional. See Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554 (E.D.Pa. 1975)(three-judge court), aff'd mem. in part sub nom. Franklin v. Fitzpatrick and vacated and remanded mem. in part sub nom. Beal v. Franklin, 428 U.S. 901 (1976), modified on remand, No. 74-2440 (E.D. Pa. Sept. 16, 1977) (unreported), aff'd sub nom. Colautti v. Franklin, 439 U.S. 379, 384-86 (1979) (explaining case history). See also Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975)(three-judge court).

Thereafter, members of the Pennsylvania legislature made a renewed effort to enact a comprehensive scheme that contained stringent limitations on

abortions.[2] That bill was rejected by the relevant legislative committee; however, when presented on the floor of the House as an amendment to an unrelated Senate bill,[3] it passed overwhelmingly. Representative Stephen Friend, leader of floor debate and co-sponsor of the bill, reportedly explained its import at a news conference as follows:

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[2]The bill was based on a model developed by Americans United For Life, a Chicago-based nonprofit organization. See Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick. L. Rev. 373, 382 n.84 (1983); Ecenbarger, The Life and Death of Senate Bill 742, Philadelphia Inquirer, Jan. 31, 1982, Today Magazine at 16.

[3]The Senate bill to which the abortion amendment was attached and deemed "germane" by the House concerned "tough guy" competitions (bouts involving physical contact between individuals without professional experience.)

> Look, we can't stop abortions. The message we're sending to doctors is that: "We can't stop you from performing abortions. We wish we could, and we hope to God that someday we'll get the Human Life Amendment so we can. But until that time there are going to be regulations you'll have to follow it you're going to perform abortions."

Ecenbarger, The Life and Death of Senate Bill 742, Philadelphia Inquirer, Jan. 31, 1982, Today Magazine at 23.

The Senate, after scant debate, concurred in the House amendment, Pennsylvania's Governor, Dick Thornburgh, vetoed the bill stating.

> I am concerned that [some] provisions, and to some extent the entire tone and tenor of the bill, would have the effect of imposing an undue and, in some cases, unconstitutional burden upon even informed mature adults intent on obtaining an abortion under circumstances in which the U.S. Supreme Court has determined they are entitled to do so.

Veto Message to the Senate (Dec. 23, 1981), History of Senate Bills V-2, V-4

(1981-82).[4] The abortion control bill was then revised to some extent and, after being introduced on the floor of the House as an amendment to a bill regulating paramilitary training, passed both the House and Senate. It was signed by the Governor on June 11, 1982, to become effective December 8, 1982.

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[4]In his veto message, Governor Thornburgh also stated,

> What this bill would do is erect a series of hurdles which would have to be cleared by a pregnant woman interested in obtaining an abortion ....I am concerned that some of the detailed, complex and burdensome requirements of the bill, accompanied as they are by severe criminal penalties, could well foster an atmosphere in which many physicians would be deterred from providing the kind of abortion related medical services to which the U.S. Supreme Court has held their patients are constitutionally entitled. This could well disrupt the traditional doctor-patient relationship and impinge upon the right of physicians to refrain from

In brief, the 1982 Abortion Control Act imposes detailed regulation of abortions, requiring that a physician give specified information for informed consent; that a pregnant woman wait 24 hours to give her consent; that unemancipated minors obtain parental or judicial consent; and that all second trimester abortions be performed in hospitals. The Act also strictly limits abortions after a fetus may be "viable"; requires use of techniques and, in some instances, the presence of a second

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involvement in even medically necessary abortions, and to abandon the field to marginal practitioners. It could even lead to a resurgence of "back alley" abortions, which no thoughtful person would wish to happen.

Veto Message at V-4.

physician, to save the aborted fetus; imposes detailed reporting rules; requires pathology reports; restricts the use of public resources for abortions;[5] and regulates private insurance coverage. Physicians and clinics violating the Act's provisions are subject to criminal prosecution for felonies and misdemeanors, as well as to revocation or suspension of licenses and to civil tort liability.

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[5]The Commonwealth Court of Pennsylvania has recently held that restrictions on state funding of abortions, contained in 18 Pa. Cons. Stat. Ann. § 3215(c), violate the equal protection and privacy provisions of the state constitution as well as the federal constitutional right to privacy. Fischer v. Department of Public Welfare, No. 283 C.D. 1981 (Pa. Commw. March 9, 1984). See also Fischer v. Department of Public Welfare, 497 Pa. 267, 439 A.2d 1172 (1982)(affirming preliminary injunction against predecessor provision). This issue has not been raised before us.

II.

PROCEDURAL HISTORY

Before the Act took effect, plaintiffs, the American College of Obstetricians and Gynecologists, Pennsylvania Section (ACOG), individual physicians who perform abortions, abortion clinics, clergy, and one woman who has health insurance including comprehensive coverage for abortion, filed suit in the United States District Court for the Eastern District of Pennsylvania alleging that the Act was unconstitutional in its entirety. They filed a motion for preliminary injunction, accompanied by 41 affidavits from physicians, minors, counselors, experts, clinic directors and religious leaders and a comprehensive memorandum of law, Defendants, the governor and six other state and local officials

(referred to collectively as Pennsylvania), submitted an equally comprehensive opposing memorandum. The parties submitted the issues to the district court on a detailed stipulation of uncontested facts ("Stipulation") in lieu of testimony.

The district court issued an order on December 7, 1982 enjoining the mandatory 24-hour waiting period of section 3205. The court concluded, however, that plaintiffs had failed to establish a likelihood of success as to the remaining provisions and as to the Act in its entirety. American College of Obstetricians and Gynecologists v. Thornburgh, 552 F.Supp. 791 (E.D.Pa.

1982).[6] In its opinion, the district court relied in significant part on two decisions from other circuits which were then pending before

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[6]The district court concluded that plaintiff physicians, ACOG, and medical providers all had standing to raise their own interests (or the interests of members) and those of patients and customers in challenging the Act's constitutionality. We affirm this general conclusion. See, e.g., City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481 (1983)(challenge by abortion clinics and a physician); Planned Parenthood Association v. Ashcroft, 103 S.Ct. 2517 (1983)(challenge by Planned Parenthood, two physicians and an abortion clinic); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976)(challenge by Planned Parenthood and two physicians); Singleton v. Wulff, 428 U.S. 106, 112-18 (1976)(challenge by two physicians). We address infra at note 21 the specific question of standing with respect to the Act's insurance provisions. The clergymen were held by the district court to lack standing, 552 F.Supp. at 795, but do not appeal this conclusion. Defendant Thornburgh has been dismissed by stipulation of the parties. A motion by defendant O'Bannon for dismissal is pending.

the Supreme Court, Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), aff'd in part and rev'd in part, 103 S.Ct. 2481 (1983)(Akron), and Planned Parenthood Association v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), aff'd in part and rev'd in part, 103 S.Ct. 2517 (1983) (Ashcroft).

Plaintiffs immediately filed a notice of appeal, and the Commonwealth cross-appealed as to the 24-hour waiting period. On December 9, 1982, this court granted plaintiffs' request for a stay of enforcement of the Act pending appeal. After expedited briefing and oral argument, we ordered the matter held pending the Supreme Court's decision in Akron, Ashcroft, and a third case involving criminal sanctions for abortions, Simopoulos v. Virginia, 103

S.Ct. 2532 (1983). Following those decisions, we directed the parties to file supplemental briefs and heard reargument on the impact of those cases on the issues before us. Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law. Apple Computer, Inc. v. Franklin Corp., 714 F.2d 1240, 1242 (3d Cir. 1983).

III.

LEGAL PRINCIPLES GOVERNING ABORTIONS

The legal principles which guide our consideration of the Pennsylvania statute have evolved from the Supreme Court decisions in which the Court considered various state statutes or local ordinances regulating and/or prohibiting abortions.[7] The polestar remains

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[7]City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481 (1983); Planned Parenthood Association v. Ashcroft, 103 S.Ct. 2517 (1983); Simopoulos v. Virginia, 103 S.Ct. 2532 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 52 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975)(per curiam); Bigelow v. Virginia, 421 U.S. 809 (1975); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); United States v. Vuitch, 402 (Footnote continued on next page).

the seminal opinion of Justice Blackmun writing for the majority in Roe v. Wade, 410 U.S. 113 (1973). There the Court held that the fundamental constitutional right of privacy, which guarantees freedom of personal choice in matter of marriage and family life, see, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Grtswold v. Connecticut, 381 U.S. 479 (1965), also encompasses a woman's right to choose an abortion, 410 U.S. at 153. In the decade of decisions following Roe v. Wade, "the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the

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U.S. 62 (1971); see also Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980); cf. Carey, Population Services International, 431 U.S. 678 (1977) (restrictions on sale and advertising of contraceptives).

highly personal choice whether or not to terminate her pregnancy." City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2487 n.1 (1983)(Akron).

Because abortion is a medical procedure requiring the advice and assistance of competent, trained medical personnel, a woman cannot exercise her fundamental right alone. For this reason, the states must give the physician room to exercise sound medical judgment in assisting the woman to make and implement her decision. See Akron, 103 S.Ct. at 2491; Colautti v. Franklin, 439 U.S. 379, 387 (1979); Doe v. Bolton, 410 U.S. 179, 192 (1973); Even after the affirmation of these principles in Roe v. Wade and their reaffirmation in the cases that followed, some states have continued to enact laws limiting the

pregnant woman's constitutional right by placing burdensome restrictions on her physician, and by imposing other obstacles that prevent, delay, or discourage the woman's attempt to vindicate her right of personal choice. The role of the courts in reviewing such legislation has been clearly delineated: "(R)estrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest." Akron, 103 S.Ct. at 2491; Roe v. Wade, 410 U.S. at 155.

The Supreme Court has identified two compelling state interests that may justify regulation or control of the woman's exercise of her right: the health of the pregnant woman and the protection of the fetus capable of

meaningful life,[8] The Court has viewed the strength of the relevant interests in terms of the trimesters of pregnancy.

The state's interest in the mother's health becomes compelling at the end of the first trimester, Roe v. Wade, 410 U.S. at 163. Because of the relative simplicity and safety of abortion procedures during the first trimester, regulations imposed during that period and that restrict competent medical personnel do not appreciably advance the State's interest in maternal

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[8]The court has also recognized that states have a legitimate interest in protecting the best interests of minors who seek abortions and who may be less capable than adults of making important decisions. See Ashcroft, 103 S.Ct. at 2525 (parental or judicial consent); H.L. v. Matheson, 450 U.S. 398(1981)(parental notice).

health, Akron, 103 S.Ct. at 2492 & n.11, 2495 (explicitly retaining the trimester standard). The absence of a compelling state interest during the first trimester requires that the state permit the woman, "in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the state.'" Akron, 103 S.Ct. at 2492 (quoting Roe v. Wade, 410 U.S. at 163).[9]

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[9]However, certain regulations touching on first trimester abortions that have no significant impact on the woman's exercise of her right may be permissible if the State can prove they further important state health objectives without interfering in the physician-patient relationship or the woman's choice between abortion and childbirth. See Ashcroft, 103 S.Ct. at 2522-25 (pathology reports); Planned Parenthood v. Danforth, 428 U.S. at 65-67, 79-81 (minor informed-consent and recordkeeping requirements).

From the end of the first trimester, the state may regulate the abortion procedure to the extent that the regulation reasonably relates to the

preservation and protection of maternal health." Roe v. Wade, 410 U.S. at 163. These regulations may not depart from accepted medical practice. Akron, 103 S.Ct. at 2493. Moreover, the restrictions adopted as health standards must be legitimately and directly related to the health objective and must not be overbroad or unreasonably burdensome upon a woman's access to an abortion,[10] since during this

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[10]On these grounds, the Supreme Court has struck down a state ban on saline abortions in the second-trimester, finding that this would increase costs and limit availability of abortions without a showing of important health benefits. Planned Parenthood v. Danforth, 428 U.S. at 77-79. Similarly, the Court has rejected a requirement that second-trimester abortions be performed only in hospitals, concluding that the increased difficulty, cost, and risk of delay in finding and obtaining a hospital abortion was significant and that medical knowledge did not support hospitalization for all second-trimester abortions. Akron, 103 S.Ct. at 2495-97; Ashcroft, 103 S.Ct. at 2520.

period the state may not seek to "directly restrict[ ] a woman's decision whether or not to terminate her pregnancy." Colautti v. Franklin, 439 U.S. at 386.

The interest of the state in the potentiality of human life becomes compelling only at "viability," when the attending physician, "on the particular facts of the case before him," concludes there is a reasonable likelihood of the fetus' "sustained survival" and "meaningful life" outside the womb. Colautti v. Franklin, 439 U.S. at 387-88; see Roe v. Wade, 410 U.S. at 163. In Roe, the Court observed that most physicians placed viability at about seven months, though some considered it possible as early as six months, the end of the second trimester, 410 U.S. at 160.

States may regulate abortions after viability in the interest of the unborn child and may even prohibit abortions, except those to preserve the life or health of the mother. Id. at 164-65. "Serious ethical and constitutional difficulties" are presented, however, if such measures do not clearly prevent the doctor from "trad[ing] off" the health of the woman for that of the fetus. Colautti v. Franklin, 439 U.S. at 400. See also Ashcroft, 103 S.Ct. at 2522 n.8 (plurality); id. at 2530-31 (dissent). The Court has carefully examined statutes that impose duties or criminal sanctions on the physician at "viability" because of the significant dangers such laws pose as to vagueness, overbreadth, interference with the doctor-patient relationship, and chilling of the woman's constitutional

rights. See, e.g., Planned Parenthood v. Danforth, 428 U.S. at 82-84 (overbreadth); Colautti v. Franklin, 439 U.S. at 389-400 (vagueness, chilling, overbreadth).

With these principles in mind we turn to the Pennsylvania Act. We may not inquire as to whether the Pennsylvania legislature's intent to restrict a pregnant woman's fundamental right to choose an abortion was so "fundamental an inducement" as to invalidate the entire act, see 2 C. Sands, Sutherland Statutory Construction & 44.06 (4th ed. 1973), or whether the provisions that the Commonwealth now concedes are unconstitutional and those that we conclude impermissibly infringe on the woman's rights, see infra, are so central to the Act's dominant purpose as to warrant voiding the entire statute.

See 2 C. Sands at § 44.07. Instead of invalidating the entire act, as appellants urge, we are obliged to follow the example of the Supreme Court in overlooking what may reasonably be deemed to be a pervasive invalid intent, and instead review the various provisions of the Pennsylvania statute independently, and on their own merit. See, e.g., Ashcroft, 103 S.Ct. at 2521-26; Planned Parenthood v. Danforth, 428 U.S. at 63-67, 79-81 (both upholding portions of Missouri's comprehensive abortion legislation). The relevant provisions of the Pennsylvania 1982 Abortion Control Act are set forth in Appendix A to this opinion.

IV.

PROVISIONS CONCEDED TO BE UNCONSTITUTIONAL

The Commonwealth properly concedes that in light of Akron and Ashcroft, several sections of the Act are unconstitutional on their face. The only provisions enjoined by the district court are found in §§ 3205(a)(1) and (a)(2), and impose a 24-hour waiting period between the time a woman seeking an abortion receives the required medical advice and the time a physician may accept her certification of informed consent and perform the abortion. The Supreme Court in Akron found that no interest in maternal health was furthered by such an "arbitrary and inflexible waiting period" and that such a mandatory 24-hour waiting period impermissibly infringed upon the physician's discretion in the exercise

of medical judgment, while increasing the cost and risk in delay of abortions by requiring two trips to an abortion facility. 103 S.Ct. at 2503. "[I]f a woman, after appropriate counseling is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." Id.

Second, the Commonwealth concedes that the district court erred in upholding the requirement in section 3205(a)(1) that the physician performing the abortion or the referring physician, "but not. . .the agent or representative of either," counsel the woman on the risks of the abortion procedure. The Supreme Court found in Akron that it was "unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevent to informed consent," 103 S.Ct. at 2503,

because the State's interest is in ensuring that the woman "obtains the necessary information and counseling from a qualified person, not [in] the identity of the person from whom she obtains it. "Id. at 2502.

Third, the Commonwealth concedes the unconstitutionality of section 3209, which requires that all non-emergency abortions after the first trimester be performed in a hospital. The Supreme Court concluded that such a provision "places a significant obstacle in the path of women seeking an abortion." Akron, 103 S.Ct. at 2495. Not only do costs greatly increase, but given the difficulty of finding a willing hospital the requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk." Id. This significant burden is not justifiable as

a health regulation because many second-trimester abortions can be performed safely on an outpatient basis. Thus, the requirement "has the effect of inhibiting . . . the vast majority of abortions after the fist 12 weeks and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion." Id. at 2497 (quoting Planned Parenthood v. Danforth, 428 U.S. at 79) (citations omitted). These rulings by the Supreme Court are dispositive of the similar provisions in the Pennsylvania Act.

V.

CHALLENGED PROVISIONS

§ 3203: Definitions

Abortion

The Act defines abortion as the use of any means to terminate a "clinically diagnosable" pregnancy "with

knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." It expressly excludes from the definition "the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of fertilized ovum within the uterus." Appellants challenge this definition as vague and overbroad. They argue that it may be read to include ordinary gynecological procedures on women not known or believed to be pregnant which cause an abortion when the woman's pregnancy was, in fact, diagnosable, and that this invalidity infects and is inseparable from the remainder of the Act. The Commonwealth concedes that the statute will survive only if "abortion" is defined to include an intent requirement. Brief for Appellees at 37-29.

If the Act explicitly defined abortion as the intentional termination of a human pregnancy, it would satisfy the requirement that a statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United States v. Harriss, 347 U.S. 612, 617 (1954), or give "a reasonable opportunity to know what is prohibited," Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). We have the duty in "marginal cases" to make the offense "constitutionally definite by a reasonable construction of the statute," United States v. Harriss, 347 U.S. at 618, and thus read the definition to incorporate an intent requirement as defined in the Pennsylvania Code, 18 Pa. Cons. State Ann. § 302(b)(1)(Purdon 1983), thereby saving it from unconstitutionality.

Physician

"Physician" is defined as "[a]ny person licensed to practice medicine in this Commonwealth." Appellants argue that the Act excludes osteopaths and that this exclusion violates the Equal Protection clause of the Fourteenth Amendment. The Commonwealth concedes that osteopaths are qualified to perform abortions. Brief for Appellees at 34; Stipulation para's. 56-57, App. at 84-85a. The Commonwealth contends that because osteopathic physicians are included in the general definition of "physician" as "an individual licensed under the laws of this Commonwealth to engage. . .in the practice of osteopathy or osteopathic surgery. . .," contained in the Statutory Construction Act, 1 Pa. Cons. Stat. Ann. § 1991 (Purdon Supp.

1982),[11] they are also within the class of "physicians" allowed to perform abortions under the Abortion Control Act.

The language of the abortion statute undercuts the Commonwealth's

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[11]Section 1991 incorporates the definition of "osteopathy" in the Act of March 19, 1909, No. 29, 1909 Pa. Laws 46, (codified as amended at 63 Pa. Cons. Stat. Ann. § 266 (Purdon 1968), which was repealed in 1978. The broad definition there provided that licensed osteopaths could practice "operative surgery, obstetrics, and the use of drugs without restriction. The phrase 'osteopathy and surgery' as used in this act means a complete school of the healing art applicable to all types and conditions of disease and disorders, and practiced as authorized herein by physicians and surgeons possessing the degree of doctor of osteopathy" (emphasis added). See Commonwealth v. Cohen, 142 Pa. Super. 199, 202-03, 15 A.2d 730, 732-33 (1940)(osteopaths have the standing of "physicians"). That Act was replaced by the Osteopathic Medical Practice Act, 63 Pa. Cons. Stat. Ann. §§ 271.1-18 (Purdon Supp. 1983), which although not specifically referred to in the Statutory Construction Act is consistent with the interpretation that all licensed osteopaths are "physicians." See 63 Pa. Cons. Stat. Ann. § 271.2.

position. It requires that the physician be "licensed to practice medicine," which, under Pennsylvania law, is distinguished, for some purposes, from being "licensed to practice osteopathic medicine," 63 Pa. Stat. Ann. § 421.7, even though the disciplines substantially overlap. The two branches are regulated by different acts, the Medical Practice Act, 63 Pa. Cons. Stat. Ann. § 421.1-18 (Purdon Supp. 1983), and the Osteopathic Medical Practice Act, 63 Pa. Cons. Stat Ann. §§271.1-18 (Purdon Supp. 1983), which establish separate regulatory bodies and qualifications.

Furthermore, the suggestion that the legislature intended to include osteopaths as "physicians" is inconsistent with the Act's disciplinary sanctions, which include license suspension and revocation under the

Medical Practice Act but not under the Osteopathic Medical Practice Act. See Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3204(d), 3205(c), 3206(i), 3209, 3211(b), 3213(c), 3214(i), 3219(a). The Medical Practice Act, by its express terms, does not apply to osteopathy. 63 Pa. Cons. Stat. Ann. § 421.17(a)(6).

In light of this statutory structure, and in the absence of a narrowing construction by Pennsylvania courts, we are unable to adopt the construction of the district court that "physician" in the Abortion Control Act includes osteopaths. However, our conclusion does not require striking down the entire Act. The better approach to this underinclusive statute is the one suggested by the Commonwealth as in accord with legislative intent: to strike and enjoin enforcement of the definition of "physician" contained in

section 3203, thereby returning the definition of physician to that generally applicable and contained in the Statutory Construction Act, which includes osteopaths. See Califano v. Westcott, 443 U.S. 76, 89 (1979); Snider v. Thornburgh, 496 Pa. 159, 178-79, 436 A.2d 593, 602 (1981).

§ 3205: Informed Consent

The provision that an abortion can be performed only with the voluntary and informed consent of the woman, which appellants do not challenge, also requires that specific information be imparted to her in order to secure her informed consent.[12] The district

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[12]The Commonwealth concedes that the additional requirement for physician-only counseling and the 24-hour waiting period are unconstitutional. See supra IV.

court rejected appellants' challenge to this requirement on the ground that it was not shown to cause undue burden or expense. 552 F.Supp. at 798-800.

Section 3205(a)(1) sets forth five categories of information that must be provided, including "[t]he fact that there may be detrimental physical and psychological effects which are not accurately foreseeable" ((a)(1)(ii)), and "[t]he probable gestational age of the unborn child at the time the abortion is to be performed" ((a)(1)(iii)). Section 3205(a)(2) sets forth three additional categories of information that must be provided, including "[t]he fact that medical assistance benefits may be available for prenatal care. childbirth and neonatal care" ((a)(2)(i)); "[t]he fact that the father is liable to assist in the support of her child, even in instances where the father

has offered to pay for the abortion" ((a)(2)(ii)); and the fact that the woman has the right to review certain printed materials described in section 3208, which include, e.g., "[g]eographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies;" a statement that "[t]he Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion"; and "[m]aterials designed to inform the woman of the probably anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including and relevant information on the possibility of the unborn child's

survival." See 18 Pa. Cons. Stat. Ann. § 3208 (incorporated by reference in § 3205(a)(2)(iii)).

No Supreme Court opinion has sustained a statutory provision prescribing in specific terms as here, the types of information that should be provided to a pregnant woman seeking an abortion. Instead, in Akron, where the Court reviewed an ordinance requiring the provision of specific information, much of which parallels that required here,[13] the Court struck the provision

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[13]For example, both the Akron ordinance and the Pennsylvania statute require, in addition to "the particular. risks associated with [the procedure], that the woman be specifically informed of psychological and physical effects including hemorrhage, risks to subsequent pregnancies and sterility. See Akron, Ohio Codified Ordinances §§ 1870.05(b)(5),18 Pa. Cons. Stat. Ann. § 3205(a)(ii)-(iii). Both require information as to agencies that offer alternatives to

in its entirety. The Court did so in reliance on two central precepts that have informed the abortion decision since Roe v. Wade and Doe v. Bolton; first, the principle of deference to the physician's medical judgment, which "may be exercised in light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient," and the concomitant need to allow "the attending physician the room he needs to

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abortion. See Akron, Ohio Codified Ordinances § 1870.05(B)(7) (1978); 18 Pa. Cons. Stat. Ann §§ 3205(a)(2)(iii), 3208(a)(1). Both require information as to the fetus' probable gestational age and the availability of detailed information as to the characteristics of the fetus. Compare Akron, Ohio Codified Ordinances §§ 1870.05(b)(2)-(3) (physicians to inform of characteristics) with 18 Pa. Cons. Stat. Ann. §§ 3205(a)(1)(iv) and (a)(2)(iii)(physician to make available information as to characteristics spelled out in section 3208(a)(2)).

make his best medical judgment," Doe v. Bolton, 410 U.S. at 192, and second, the requirement that the state avoid regulations "designed to influence the woman's informed choice between abortion or childbirth." Akron, 103 S.Ct. at 2500.

As in Akron, "it is fair to say that much of the information required [availability of benefits, support liability, unforeseeable risks] is designed not to inform the woman's consent but rather to persuade her to withhold it altogether," an objection the Court found decisive in that case. 103 S.Ct. at 2500. Further, as in Akron, the specification of "a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision" impose objectionable obstacles to "the

responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." Id.

The Akron case reaffirms that the doctor/counselor must be given the opportunity to tailor the information given a patient to the exigencies of the case. Although some of the information listed in the Pennsylvania Act would be objectionable standing alone, see, e.g., 18 Pa. Cons. Stat. Ann. § 3205(a)(1)(i) (name of physician who will perform the abortion), and although the state may require in general terms that the woman be provided with information needed to secure her consent, Akron, 103 S.Ct. at 2501, the informed consent provisions of section 3205, just as those in Akron, are not severable. See id. at 2501 n.37. The entire scheme here and as incorporated in other sections defining

voluntariness in terms of specific information to be provided is invalid, and cannot be enforced.

§ 3206: Parental Consent

In this provision, the Act requires unemancipated minors to obtain the consent of their parents or a court order before an abortion can be performed. Appellants argue that this section deprives minors who choose abortion of equal protection of the law because it singles out abortion as the only pregnancy-related medical procedure requiring third party consent. Although this particular challenge was not before the Court in Akron or Ashcroft, and was specifically reserved by the Court in Bellotti v. Baird, 443 U.S. 622, 650 n.30 (1979)(Bellotti II), the Court has rejected challenges to abortion statutes based on different treatment in other

contexts between abortions and other medical decisions. See H. L. v. Matheson, 450 U.S. 398, 412-13 (1981)(distinction as to parental notice); Harris v. McRae, 448 U.S. 297, 325 (1980) (abortion funding); Planned Parenthood v. Danforth, 428 U.S. at 66-67 (written consent to abortion).

Moreover, states are permitted to regulate a minor's exercise of her constitutional rights in a manner that would not be permissible in the case of an adult in light of the special consideration that minors need. The Court has held that consent or notice provisions are important protections for minors who, because of stress of ignorance of alternatives, may not be able intelligently to decide whether to have an abortion. Id.; Bellotti II, 443 U.S. at 640-41 (plurality opinion by Powell, J.) see also Akron, 103 S.Ct at

2491 n.10. Therefore, we reject appellants' equal protection challenge.

Appellants also contend the section is void for vagueness because the term "emancipation" is not defined in the Act. The same defect was alleged in Ashcroft but was rejected by the Court on the ground that the term had a clear meaning in Missouri common law. 103 S.Ct. at 2525 n.18. Thus, the fact that in Pennsylvania, as in Missouri, "the question whether a minor is emancipated turns upon the facts and circumstances of each individual case" does not make it vague as a matter of law. Id.; see also Indiana Planned Parenthood Affiliates Association v. Pearson, 716 F.2d 1127, 1140 (7th Cir. 1983). We reject the vagueness challenge.

Appellants' challenge to the procedural inadequacies of this section causes us more concern. The state cannot impose a parental veto on the decision of a minor to undergo an abortion, Bellotti II, 443 U.S. at 649-50, and the state must provide an "alternative procedure whereby a pregnant mother may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." Akron, 103 S.Ct. at 2498. This alternative is particularly important because "there are few (other) situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Bellotti II, 443 U.S. at 642.

The Missouri statute upheld in Ashcroft establishing alternative court

proceedings for minor consent contained detailed provisions assuring confidentiality and dispatch, establishing a clear and simple procedure for the minor to follow in setting forth her petition, and directing court personnel to assist the minor in preparing the petition. Ashcroft, 103 S.Ct. at 2519-20 n.4, 2525-26. Comparable provisions are absent in the Pennsylvania statute. This difference is critical. To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form.

However, in light of the Pennsylvania Act's provision requiring the Supreme Court of Pennsylvania to promulgate rules assuring confidentiality and promptness of disposition, we cannot

hold that the provision is facially unconstitutional. We have been advised that the Pennsylvania Supreme Court has not yet enacted any rules to fill in the gaps of the Pennsylvania statute. In fact, it appears that the only county to establish rules on its own also included a provision for notification of the parents or alleged father, see Local R. No. 16.3(B), C.P. Chester County, 13 Pa. Admin. Bull. 2187, 2190 (1983), an obligation that may obstruct, rather than implement, the requirement that an alternative decision-maker be available. See Indiana Planned Parenthood Affiliates Association v. Pearson, 716 F.2d at 1132, 1139.

We cannot agree with the Commonwealth's suggestion that we regard a letter written by the then Chief Justice to the Common Pleas courts suggesting that the courts apply adoption rules "if

applicable", see Letter from Hon. Henry D. O'Brien, Chief Justice, to Hon. Anthony R. Appel, President Judge, C.P. Lancaster County (Nov. 16, 1982), included in Supplemental Brief for Appellees (Exhibit A) as a satisfactory substitute for written and explicit rules that fill the statutory gap. Consequently, although we do not invalidate section 3206, its operation should be enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action, if still pending, or in some future action, that the regulations are unconstitutional.

§ 3207(b): Abortion Facilities, Reports

The challenged portion of this section requires abortion facilities to file reports that are subject to public disclosure containing information regarding abortion facilities and their affiliates. Appellants contend this forced disclosure is likely to subject them to threats, reprisals or harassment from segments of the public opposing abortion.

We agree with the district court that there is no evidence in the record that this section will appreciably affect a woman's abortion decision. Appellants have not as yet demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights. Therefore we find inapposite Brown v. Socialist Workers '74 Campaign Committee, 103 S.Ct. 416 (1982), on which appellants

rely, where the Court held that compelled disclosure of party contributor lists may reasonably lead to harassment based on associational ties. Since there has been no showing of any effect of the disclosure on the abortion decision, and the state has proffered the important justification that the provision will help insure that shoddy practitioners may not hide behind the corporate veil, we reject appellants challenge.

§ 3208: Printed Information

This provision, discussed in connection with section 3205, fails for the reasons discussed there. We conclude it is inextricably intertwined with section 3205, and therefore cannot be severed. There is no certainty of any legislative intent that section 3208 should stand alone. We express no view

as to whether the state may undertake an independent informational campaign relating to abortion, since it has not done so here.

§ 3210: Abortion After Viability Prohibition

Section 3210(a) provides that "[a]ny person who intentionally, knowingly or reckless[ly] performs or induces an abortion when the fetus is viable" commits a felony of the third degree. A physician has two "complete defense[s]": that he had "concluded in good faith, in his best medical judgment," that (1) "the unborn child was not viable at the time the abortion was performed or induced," of that (2) "the abortion was necessary to preserve maternal life or health."

In Roe v. Wade, the Court decided that the "important and

legitimate interest [of the state] in protecting the potentiality of human life" becomes so compelling at viability that at this stage the state may proscribe abortions altogether, "except when it is necessary to preserve the life or health of the mother." 410 U.S. at 162, 164. Apparently because of this language, and its reiteration in the decisions that followed, appellants have not challenged the state's use of "viability" as the determining time when abortions are proscribed. Indeed, a statute that established the limit for performance of abortions in terms of the weeks of pregnancy would have been invalid. As the Court stated in Danforth, "[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation

period." 428 U.S. at 64.

On the other hand, because of the uncertainty of the viability determination itself, a statute that imposes strict criminal and civil liability upon a physician for performing or inducing an abortion after viability may create a profound chilling effect on the willingness of physicians to perform abortions near the point of viability. See Colautti v. Franklin, 439 U.S. at 396. Thus, we must be particularly cautious in scrutinizing these provisions to assure that they have not imposed or caused an impermissible restriction on acts that are constitutional. It is noteworthy that no Supreme Court case had upheld a criminal statute prohibiting abortion of a viable fetus. Each such statute considered either did not contain such a criminal provision effective at

viability or was invalidated because there were fatal omissions in the statutory language or scheme. See Danforth, 428 U.S. at 81-84 (plurality); id. at 89 (Stewart J., concurring) (upholding definition of viability, but striking down criminal sanction as overbroad); Colautti v. Franklin, 439 U.S. at 396 (striking down criminal sanction pertaining to viability as vague and potentially overbroad).[14] We therefore first consider whether this provision suffers from the same defects.

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[14]A Missouri statute containing such a sanction was at issue in Ashcroft. The Court did not address the general proscription of abortions after viability, see 103 S.Ct. at 2521, but upheld a provision requiring a second physician at viability and imposing penalties for violation. Id. at 2519 n.3, 2521-22.

The declaration of the prohibited act, i.e. abortion of a viable fetus, must be construed to incorporate the statutory definition of "viability" in section 3203. Appellants mount no independent challenge to that definition, and it parallels the definition of "viability" upheld in Danforth, 428 U.S. at 63.[15] Instead, appellants challenge the adequacy of the defenses, claiming that they are too narrow and are violative of due

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[15]The definition of "viability" contained in § 3203 and incorporated in § 3210(a) must be distinguished from the Act's definition in § 3203 of "born alive" as referring to a "human being [who] was completely expelled or extracted from his or her mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity." We express no view as to whether any sanctions may be imposed for conduct or omissions relating to a fetus that is "born alive."

process. Appellants claim that section 3210(a) is unconstitutional because it places the burden on the defendant physician to prove his or her innocence. They argue that the Pennsylvania Act does not squarely place the burden of proving absence of medical necessity on the state.

In United States v. Vuitch, 402 U.S. 62 (1971), the Court construed the District of Columbia's abortion ordinance, which also did not explicitly place upon the state the burden of proving the abortion was unnecessary. The Court, however, in construing the statute to uphold its constitutionality, reasoned that Congress could not have intended that a physician be required to prove his or her innocence, and held that the ordinance placed the burden on the prosecution to plead and prove the abortion was unnecessary. Id. at

70-71. Thereafter, in Simopoulos v. Virginia, 103 S Ct. at 2535, the Court held that it was permissible to place the burden on the defendant to invoke medical necessity as a defense, if the burden of proof of lack of medical necessity then shifted to the prosecution.

We recognize that the Pennsylvania Supreme Court, unlike the Virginia Supreme Court, has not yet issued an authoritative construction that the burden of proof as to lack of necessity rests with the prosecution. We are confident that the Supreme Court of Pennsylvania, if and when confronted with the issue, will also construe the statute in the manner adopted by the Supreme Court of the United States and the Supreme Court of Virginia. Because we believe the statute must be read as placing on the prosecution the burden or

proving absence of medical necessity, we reject appellants' challenge on this ground.

The second defense in § 3210(a) specifies that a physician may perform an abortion even after viability when necessary "to preserve maternal life or health." It is clear from the Supreme Court cases that "health" is to be broadly defined. As the Court stated in Doe v. Bolton, the factors relating to health include those that are "physical, emotional, psychological, familial, [as well as] the woman's age." 410 U.S. at 192.

As appellants have noted in their challenge to section 3210(b), it is apparent that the Pennsylvania legislature was hostile to this definition. Section 3210(b) contains the statement, "The potential psychological or emotional impact on the

mother of the unborn child's survival shall not be deemed a medical risk to the mother." Had the legislature imposed this qualification on the language "maternal. . .health" in section 3210(a), we would have no hesitation in declaring that provision unconstitutional. However, since it does not so state, and we are bound to construe it as constitutional, if possible, we again rely with confidence on the Supreme Court of Pennsylvania to construe "health" as does the Supreme Court of the United States.

We remain deeply concerned, however, because it is not improbably that imposition of criminal sanctions on physicians for the abortion of a viable fetus may deter conscientious physicians from undertaking the risk of error when the pregnancy approaches the end of the second trimester. However, the record

is silent on this issue. At this stage of the proceeding, and in light of the Supreme Court's reiteration of the state's power to prohibit abortion of a viable fetus unless medically necessary, we are compelled to reject any challenge to the facial validity of this provision. We express no view as to our holding were the appellants to produce convincing evidence of unconstitutional chill.

"Significantly greater" risk

Section 3210(b) requires that the method of abortion used when the fetus is viable must be that method most likely to result in the fetus being "aborted alive,"[16] unless that

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[16]The term "aborted alive" is not defined. We express no view as to its meaning or propriety.

procedure ould result in a "significantly greater" risk to the mother. In Colautti v. Franklin, 439 U.S. at 400, the Court held that the earlier Pennsylvania statute impermissibly required the doctor to "make a 'trade-off' between the woman's health and. . .fetal survival." The new Pennsylvania statute, like the old, fails to require that maternal health be the paramount consideration.

The district court recognized that if the Act required the mother to bear any increased risk in order to save the fetus, it would be unconstitutional, and attempted to save the provision by construing "significantly" to mean "medically cognizable." Under that construction, if the abortion technique that would save the fetus involves an increased risk to a mother, then the procedures safest for the mother must be

used.

Such a reading is inconsistent with the statutory language and the legislative intent reflected in that language. The legislature deliberately used the word "significantly" to modify the risk imposed on the mothers, and that adverb is patently not surplusage. In considering other sections of the statute, we have followed the principle of construing a statute, whenever possible, in such manner as to render it constitutional. However, that construction must be one to which the language of the statute is reasonably susceptible, and which comports with the probable intent of the legislature. See 2A C. Sands, Sutherland Statutory Construction § 45.11. Otherwise, this court would itself be acting as a legislature. We conclude that the language of section 3210(b) is not

susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus, and therefore hold section 3210(b) unconstitutional. In view of this ruling, we do not reach the other challenges raised by appellants to this section.

Second physician for viable fetus

Section 3210(c) requires, under penalty of prosecution for a felony, that a physician who performs an abortion using a method that "in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance. . .of a second physician" whose task is to take "all reasonable steps. . .to preserve the child's life and health." In Ashcroft, a majority of the Court upheld a provision of the

Missouri statute requiring a second physician to be present whenever an abortion is to be performed upon a viable fetus. Six Justices (the four dissenting Justices and Justice Powell, with whom the Chief Justice joined) expressed the view that an exception to the second physician requirement for medical emergencies was a factor essential to its validity. The four dissenting Justices believed this critical requirement could not be implied. 103 S.Ct at 2530-31. Justice Powell concluded that the existence of a clause in the same section requiring a physician to preserve the life of the fetus "provided that it does not pose an increased risk to the life and health of the woman" could reasonably be construed to supply a medical emergency exception to the second physician requirement. Id. at 2522 n.8.

The Pennsylvania Act, like the Missouri Act, has no clearly expressed exception for the performance of an abortion of a viable fetus without the second physician in attendance. We cannot with any confidence assume the legislature intended the clause in section 3210(a), providing a defense for abortions necessary to preserve maternal life or health, to be equally applicable to section 3210(c), the second physician requirement. The two provisions are separated by the intervening provision, section 3210(b) on degree of care, which on its face evinces the Pennsylvania legislature's unconstitutionally restrictive view of maternal health, a view not apparent in the parallel Missouri provision.

In light of this provision, the most reasonable construction we can make of the probable legislative intent is

its willingness to permit an abortion of a viable fetus with the defense of preservation of maternal life or health, but unwillingness to apply such a broad defense to the specific restrictions or regulations pertaining to the abortion of a viable fetus, i.e., those in section 3210(b) and section 3210(c).[17]

As with section 3210(b), we conclude we cannot rewrite the statute enacted by the legislature, and thus hold section 3210(c) similarly invalid for failing to prevent a trade-off

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[17]The Pennsylvania Act does contain an entirely separate definition of "medical emergency" not incorporated in § 3210(c). Such "emergencies" are limited to abortions necessary "to advert the death of the mother" or prevent "grave peril of immediate and irreversible loss of major bodily function." Were this definition read as applicable to the second physician requirement, even though the statute does not so provide, it would give the woman's own physician insufficient room to protect her health.

of maternal health for the possibility of fetal survival.[18]

§ 3211: Viability

This section, incorporated by reference in section 3214(a)(8), requires a physician to report the basis for his determination "that a child is not viable" and if he has determined that a child is viable, to "report the basis for his determination that the abortion is necessary to preserve maternal life or health."[19] Even

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[18]We do not reach the question whether § 3210(c) unconstitutionally requires the presence of a second physician at a stage prior to viability by the phrase "method [that] does not preclude the possibility of the child surviving the abortion."

[19]We believe Chief Judge Seitz too narrowly construes the scope of appellants' challenge to the reporting requirements. Two sections of the Act, §§ 3211 and 3214(a)(8), require the

FOOTNOTE CONTINUED

if we could read this section as requiring such reports only as to abortions performed subsequent to the first trimester of pregnancy, there is no important state interest further by requiring the physician to make such a report as to abortions of non-viable fetuses in the second trimester. The Commonwealth has adduced no evidence that there is a significant chance of viability throughout the second-trimester. The evaluation and reporting

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FOOTNOTE CONTINUED

filing of the same viability reports. Appellants have consistently challenged, in its entirety, the requirement of individual reports to be filed for each abortion under section 3214(a). Complaint para's. 121, 124, App. at 35a, 36a; Brief for Appellants at 43-44. Their briefs have also asserted a challenge in general terms to the undue burden of the Act's reporting requirements. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 98-107; Supplemental Brief for Appellants at 30-31.

requirements of section 3211(a) cannot be substantially distinguished from those of section 3214 discussed infra and fall for the same reasons.

§ 3214: Reporting

This section of the Act requires in (a), (b), and (h) detailed reporting with regard to each abortion performed irrespective of the state of pregnancy. The physician must sign a report to be filed the following month, which includes fourteen categories of data, including but not limited to identification of the physician, facility, and referring physician, agency or service; the political subdivision and state in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period and probable

gestational age of the unborn child; the type of procedure performed; complications; the "length and weight of the aborted unborn child when measurable"; the "[b]asis for any medical judgment that a medical emergency existed," the viability report referred to in section 3211(a), and the method of payment for the abortion. Another detailed report must be filed by the physician as to each woman who has "complications" from an abortion or attempted abortion.

In Danforth the Court upheld certain recordkeeping requirements imposed by that act on health facilities and physicians, stating, "Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." 428 U.S. at

80. However the Court characterized the Missouri Act's recordkeeping, later described in Akron as "minor regulations", 103 S.Ct. at 2493 & n.13, as "approaching impermissible limits". 428 U.S. at 81.

The statute challenged in Danforth merely provided generally for recordkeeping by health facilities and physicians concerned with abortions on forms to be supplied for the functions of "preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data" and monitoring abortions to assure that they are done in accordance with the provisions of the law. 428 U.S. at 87. That Act required no recordkeeping close to the extent imposed by the Pennsylvania Act. The Court cautioned that recordkeeping and record-

maintaining provisions must not be "utilized in such a way as to accomplish, through the sheer burden or recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." Id. at 81.

The nature and complexity of the reporting requirements of the Pennsylvania Act have crossed the permissible threshold. The district court here upheld the recordkeeping required in section 3214 as "related to the state's interest in protecting the health of its citizens." 552 F.Supp. at 804. The appropriate test is whether these detailed reporting requirements have a significant impact on the woman's abortion decision.

The parties have stipulated that the reporting requirements will increase the costs of the abortions. Stipulation para. 194. The state has proffered no

compelling state interest to justify much of the detail required. There are additional objections to some of the specific information required. For example, the compulsion that a physician report the basis for his or her medical judgment at various stages appears inconsistent with the Court's directive that a physician be accorded broad discretion, and could have a profound chilling effect on the willingness of physicians to perform abortions. See Colautti v. Franklin, 439 U.S. at 396. In light of our conclusion, we do not consider appellants' challenge that these provisions also invade the mother's and doctor's privacy.

Appellants have withdrawn their challenge to (c), and presumably also to its implementation in (d), based on the Ashcroft decision, which upheld a requirement that all tissue surgically

removed during an abortion be sent to a certified pathologist for examination. Supplemental Brief for Appellants at 17 n.5.[20] They have not separately challenged before us the requirement of quarterly statistical reports to be filed by each facility in which an abortion is performed (f), and the requirement of reports of maternal deaths (g). These provisions are severable from the remainder of section 3214. However, (e) requiring compilation and disclosure of the data gathered under (a) cannot be severed from (a) and therefore also falls.

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[20]In light of appellants' position, we do not consider the apparent difference between the purpose of the Pennsylvania provision, which appears to be directed to enforcement of the statute's viability provisions, and that in the Missouri Act, which was found to be directed to maternal health. Ashcroft, 103 S.Ct. at 2524-25.

§ 3215(e): Insurance

This provision requires health and disability insurers in Pennsylvania to make available policies that exclude coverage of elective abortions except in case of rape and incest. The statute also requires that these policies cost less than policies that offer comprehensive abortion coverage. The parties have stipulated that the actuarial cost of insurance without comprehensive abortion coverage may be higher or lower than insurance with comprehensive abortion coverage. Stipulation para's. 189-91.

Appellant Plant, who averred that she has health insurance including comprehensive coverage for abortion,

challenges this provision.[21] The district court concluded that this provision would not impose a legally significant burden on a woman's right to seek an abortion, and that it is "rationally related to the public policy of the Commonwealth encouraging childbirth over abortion." 552 F.Supp. at 809.

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[21]We reject appellees' challenge to Plant's standing and the district court's suggestion that she did not allege sufficient injury in fact. The Commonwealth has passed a provision aimed at influencing the conduct of insured to choose childbirth over abortion, and has stipulated that a foreseeable result is an increase in the cost of insurance to women, such as Plant, who purchase abortion coverage. This increased cost caused by a provision directed at her is sufficient injury in fact and places her within the zone of interests of the regulation. See Columbia Broadcasting System v. United States, 316 U.S. 407, 422 (1942); Colonial Penn Insurance Co. v. Heckler, 721 F.2d 431 (3d Cir. 1983); Cotovsky-Kaplan Physical Therapy Associates v. United States, 507 F.2d 1363 1367 (7th Cir. 1975).

The state generally need not commit public funds to abortion, and may in this respect choose childbirth over abortion as a matter of policy. See Harris v. McRae, 448 U.S. 297, 316-17 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977). However, this choice was only permissible in these cases "because it did not add any 'restriction on access to abortion that was not already there.'" Akron, 103 S.Ct. at 2500 n.33 (quoting Maher, 432 U.S. at 474). Pennsylvania has gone further in favoring childbirth over abortion, and has imposed a requirement on private insurers to issue policies which do cover them. This requirement adds an additional barrier to a woman's access to an abortion and is unconstitutional. The state has produced no adequate justification for the required lower cost, conceding that the real cost of

such policies may be higher. See Stipulation § 189-91. Thus, insurance costs for women who wish abortion coverage may rise. Because the right to an abortion if "fundamental," the state's assertion that the legislature may have concluded that costs may be lower for such policies is insufficient to withstand constitutional scrutiny.

VI.

SUMMARY

The foregoing lengthy analysis was dictated by the necessity of seriatim consideration of each of the challenged provisions of the statute. The Pennsylvania legislature chose to enact a complex and extensive regulatory scheme with severe criminal sanctions containing numerous provisions which it had been advised skirted constitutional limits. We have, when possible,

attempted to give effect to the legislative intent when the provision itself is permissible. Thus we have rejected appellants' general challenges that would have vitiated the entire Act. We have sustained the provision proscribing abortions after viability, and have sustained the provision requiring abortion facilities to file reports subject to public disclosure. Other reporting provisions that have not been challenged will also be operative. Similarly we have rejected the facial challenges to the minor consent provision, which can be effectuated as soon as the Pennsylvania Supreme Court fills the legislative gap with rules that rectify the procedural inadequacies.

At the same time we cannot overlook the legislature's unduly restrictive view of the right of a

pregnant woman aided by her physician to effectuate her fundamental constitutional right to an abortion. The exceedingly detailed reporting provisions, the requirement of discriminatory insurance, the compulsion that the physician or agent provide specified information to the pregnant woman, and the attempt to control the method of abortion and mandate the attendance of a second physician in a manner trading off the woman's health for that of the fetus, represent unacceptable legislative encroachments upon the woman's constitutional right and interfere with the physician-patient relationship.

We believe that the result reached here represents a delicate accommodation between permissible regulation and control of abortions on the one hand and vindication of the

woman's right on the other hand. We will remand this case to the district court for further proceedings in accordance with this opinion.

APPENDIX

RELEVANT SECTIONS OF THE
ABORTION CONTROL ACT

18 Pa. Cons. Stat. Ann. §§ 3201-3220

§ 3202. Legislative Intent

(a) Rights and Interests. -- It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion. It is the further intention of the General Assembly to foster the development of standards of professional conduct in a critical area of medical practice, to provide for development of statistical data and to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term. The General Assembly finds as fact that the rights and interests furthered by

this chapter are not secure in the context in which abortion is presently performed.

(b) Conclusions. -- Reliable and convincing evidence has compelled the General Assembly to conclude and the General Assembly does hereby solemnly declare and find that:

(1) Many women now seek or are encouraged to undergo abortions without full knowledge of the development of the unborn child or of alternatives to abortion.

(2) The gestational age at which viability of an unborn child occurs has been lowering substantially and steadily as advances in neonatal medical care continue to be made.

(3) A significant number of late-term abortions result in live births, or in delivery of children who could survive if measures were taken to

bring about breathing. Some physicians have been allowing these children to die or have been failing to induce breathing.

(4) Because the Commonwealth places a supreme value upon protecting human life, it is necessary that those physicians which it permits to practice medicine be held to precise standards of care in cases where their actions do or may result in the death of an unborn child.

(5) A reasonable waiting period, as contained in this chapter, is critical to the assurance that a woman elect to undergo an abortion procedure only after having the fullest opportunity to give her informed consent thereto.

(c) Construction. -- In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the

common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.

(d) Right of conscience. -- It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary

to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

§3203. Definitions

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Abortion." The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the

uterus.

"Born alive." When used with regard to a human being, means that the human being was completely expelled or extracted from her or his mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity.

. . . .

"Facility" or "medical facility." Any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein medical care is provide to any person.

. . . .

"First trimester." The first 12 weeks of gestation.

"Hospital." An institution licensed pursuant to the provisions of the law of this Commonwealth.

. . . .

"Medical emergency." That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

"Medical personnel." Any nurse, nurse's aide, medical school student, professional or any other person who furnishes, or assists in the furnishing of, medical care.

"Physician." Any person licensed to practice medicine in this

Commonwealth

. . . .

"Probable gestational age of the unborn child." What, in the judgment of the attending physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed.

"Unborn child." For purposes of this chapter, a human being from fertilization until birth and includes a fetus.

"Viability." That stage of fetal development when, in the judgment of the physician based on the particular facts of the case before him and in light of the most advanced medical technology and information available to him, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

§3205. Informed consent

(a) General rule. -- No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) The woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion or by the referring physician but not by the agent or representative of either.

(i) The name of the physician who will perform the abortion.

(ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable.

(iii) The particular medical risks associated with the particular

abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility.

(iv) The probable gestational age of the unborn child at the time the abortion is to be performed.

(v) The medical risks associated with carrying her child to term.

(2) The woman is informed, by the physician or his agent, at least 24 hours before the abortion;

(i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

(iii) That she has the right to review the printed materials described in section 3208 (relating to printed information). The physician or his agent shall orally inform the woman that the materials describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. If the woman is unable to read the materials furnished her, the materials shall be read to her. If the woman seeks answers to questions concerning any of the information or materials, answers shall be provided her in her own language.

(3) The woman certifies in writing, prior to the abortion, that the information described in paragraphs (1) and (2) has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (2).

(4) Prior to the performance of the abortion, the physician who is to perform or induce the abortion or his agent receives a copy of the written certification prescribed by paragraph (3).

(b) Emergency. -- Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, if the medical indications supporting his judgment that an abortion is necessary to avert her death.

(c) Penalty. -- Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of

1974." Any other person obligated under this chapter to give information relating to informed consent to a woman before an abortion is performed, and who fails to give such information, shall, for the first offense be guilty of a summary offense and, for each subsequent offense, be guilty of a misdemeanor of the third degree.

(d) Limitation on civil liability. -- Any physician who compiles with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P.L. 390, No. 111), known as the "Health Care Services Malpractice Act."

§3206. Parental consent

(a) General rule. -- Except in the case of a medical emergency

except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa. C.S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In obtaining the consent of the woman's parent or guardian, the physician shall provide them the information and materials specified in section 3205

(relating to informed consent), and shall further obtain from them the certification required by section 3205(a)(3). In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

(b) Unavailability of parent or guardian. -If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

(c) Petition to court for consent. -- If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

(d) Court order. -- If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and

capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

(e) Representation in proceedings. -- The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel and shall, upon her request, provide her with such counsel.

(f) Proceedings confidential. -- Court proceedings under this section shall be confidential and shall be given such precedence over other pending

matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman, but in no case shall the court fail to rule within three business days of the date of application. A court of common pleas which conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting its decision and shall order a sealed record of the evidence to be maintained which shall include its own findings and conclusions.

(g) Coercion prohibited. -- Except in a medical emergency, no parent, guardian or other person standing in loco parentis shall coerce a minor or incompetent woman to undergo an abortion. The court shall grant such relief as may be necessary to prevent such coercion. Should a minor be denied

the financial support of her parents by reason of her refusal to undergo abortion, she shall be considered emancipated for purposes of eligibility for assistance benefits.

(h) Regulation of proceedings. -- No filing fees shall be required of any woman availing herself of the procedures provided by this section. An expedited confidential appeal shall be available to any pregnant woman whom the court denies an order authorizing an abortion. The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition.

(i) Penalty. -- Any person who performs an abortion upon a woman

who is an unemancipated minor or incompetent to whom this section applies either with knowledge that she is a minor or incompetent to whom this section applies, or with reckless disregard or negligence as to whether she is a minor or incompetent to whom this section applies, and who intentionally, knowingly or recklessly fails to conform to any requirement of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be suspended in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974," for a period of at least three months. Failure to comply with the requirements of this section is prima facie evidence of failure to obtain informed consent and of interference with family

relations in appropriate civil actions. The law of this Commonwealth shall not be construed to preclude the award of exemplary damages or damages for emotional distress even if unaccompanied by physical complications in any appropriate civil action relevant to violations of this section. Nothing in this section shall be construed to limit the common law rights of parents.

§3207. Abortion facilities

. . . .

(b) Reports. -- Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, which shall be open to public inspection and copying, containing the following information:

(1) Name and address of the facility.

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership with any other facility.

Any facility failing to comply with the provisions of the subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof.

§3208. Printed information

(a) General Rule. -- The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, the following easily

comprehensible printed materials:

(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall include the following statement:

"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."

(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

. . . .

§3209. Abortion after first trimester

All abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital. Except in cases of good faith judgment that a medical emergency exists, any physician who performs such an abortion in a place other than a hospital is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

§3210. Abortion after viability

(a) Prohibition; penalty. -- Any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree.

It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

(b) Degree of care. -- Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the

unborn child to be aborted alive unless, in the food faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree.

(c) Second physician. -- Any person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange

for the attendance, to the same room in which the abortion is to be completed, of a second physician. Immediately after the complete explusion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health. Any person who intentionally, knowingly, or recklessly violates the provisions of this subsection commits a felony of the third degree.

§3211. Viability

(a) Determination of viability. -- Prior to performing any abortion upon a woman subsequent to her first trimester of pregnancy, the physician shall determine whether, in his good faith judgment, the child is

viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

(b) Unprofessional conduct. -- Failure of any physician to conform to any requirement of this section constitutes "unprofessional conduct" within the meaning of the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974." Upon a finding by the State Board of Medical Education and Licensure that any physician has failed to conform to any requirement of this section, the board shall not fail to suspend that physician's license for a period of at least three months. Intentional,

knowing or reckless falsification of any report required under this section is a misdemeanor of the third degree.

§3214. Reporting

(a) General rule. -- A report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

(1) Identification of the physician who performed the abortion and the facility where the abortion was performed and of the referring physician, agency or service, if any.

(2) The political subdivision and state in which the woman resides.

(3) The woman's age, race and marital status.

(4) The number of prior pregnancies.

(5) The date of the woman's last menstrual period and the probable gestational age of the unborn child.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Complications, if any, including but not limited to rubella disease, hydatid mole, endocervical polyp and malignancies.

(8) The information required to be reported under section 3211(a) (relating to viability).

(9) The length and weight of the aborted unborn child when measurable.

(10) Basis for any medical judgment that a medical emergency existed as required by any part of this chapter.

(11) The date of the medical consultation required by section 3204(b) (relating to medical consultation and judgment).

(12) The date on which any determination of pregnancy was made.

(13) The information required to be reported under section 3210(b) (relating to abortion after viability).

(14) Whether the abortion was paid for by the patient, by medical assistance, or by medical insurance coverage.

(b) Completion of report. -- The reports shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the department within 15 days after each reporting month.

(c) Pathological examinations. -- When there is an abortion performed during the first trimester of pregnancy, the tissue that is removed shall be subjected to a gross microscopic examination, as needed, by the physician

or a qualified person designated by the physician to determine if a pregnancy existed and was terminated. If the examination indicates no fetal remains, that information shall immediately be made known to the physician and sent to the department within 15 days of the analysis. When there is an abortion performed after the first trimester of pregnancy where the physician has certified the unborn child is not viable, the dead unborn child and all tissue removed at the time of the abortion shall be submitted for tissue analysis to a board eligible or certified pathologist. If the report reveals evidence of viability or live birth, the pathologist shall report such findings to the department within 15 days and a copy of the report shall also be sent to the physician performing the abortion. Intentional knowing, reckless

or negligent failure of the physician to submit such an unborn child or such tissue remains to such a pathologist for such a purpose, or intentional knowing or reckless failure of the pathologist to report any evidence of live birth or viability to the department in the manner and within the time prescribed is a misdemeanor of the third degree.

(d) Form. -- The department shall prescribe a form on which pathologists may report any evidence of absence of pregnancy, live birth or viability.

(e) Statistical reports; public availability of reports. --

(1) The department shall prepare an annual statistical report for the General Assembly based upon the data gathered under subsection (a). Such report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed,

and shall be available for public inspection and copying.

(2) Reports filed pursuant to subsection (a) shall not be deemed public records within the meaning of that term as defined by the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law, but shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report. On those reports available for public inspection and copying, the department shall substitute for the name of any physician which appears on the report, a unique identifying number. The identity of the physician shall constitute a confidential record of the department. The department may set a reasonable per copy fee to cover the cost of making any copies authorized hereunder.

(3) Original copies of all reports filed under subsection (a) shall be available to the State Board of Medical Education and Licensure and to law enforcement officials, for use in the performance of their official duties.

(4) Any person who willfully discloses any information obtained from reports filed pursuant to subsection (a), other than that disclosure authorized under paragraph (1), (2) or (3) hereof or as otherwise authorized by law, shall commit a misdemeanor of the third degree.

(f) Report by facility. -- Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report

shall also show the total abortions performed in each trimester of pregnancy. These reports shall be available for public inspection and copying.

(g) Report of maternal death. -- After 30 days' public notice, the department shall henceforth require that all reports of maternal deaths occurring within the Commonwealth arising from pregnancy, childbirth or intentional abortion in every case state the cause of death, the duration of the woman's pregnancy when her death occurred and whether or not the woman was under the care of a physician during her pregnancy prior to her death and shall issue such regulations as are necessary to assure that such information is reported, conducting its own investigation if necessary in order to ascertain such data. A woman shall be deemed to have

been under the care of a physician prior to her death for the purpose of this chapter when she had either been examined or treated by a physician, not including any examination or treatment in connection with emergency care for complications of her pregnancy or complications of her abortion, preceding the woman's death at any time which is both 21 or more days after the time she became pregnant and within 60 days prior to her death. Known incidents of maternal mortality of nonresident women arising from induced abortion performed in this Commonwealth shall be included as incidents of maternal mortality arising from induced abortions. Incidents of maternal mortality arising from continued pregnancy or childbirth and occurring after induced abortion has been attempted but not completed, including deaths occurring after induced

abortion has been attempted but not completed as a result of ectopic pregnancy, shall be included as incidents of maternal mortality arising from induced abortion. The department shall annually compile a statistical report for the General Assembly based upon the data gathered under this subsection, and all such statistical reports shall be available for public inspection and copying.

(h) Report of complications. -- Every physician who is called upon to provide medical care or treatment to a woman who is in need of medical care because of a complication or complications resulting, in the good faith judgment of the physician, from having undergone an abortion or attempted abortion shall prepare a report thereof and file the report with the department within 30 days of the

date of his first examination of the woman, which report shall be open to public inspection and copying and shall be on forms prescribed by the department, which forms shall contain the following information, as received, and such other information except the name of the patient as the department may from time to time require:

(1) Age of patient.

(2) Number of pregnancies patient may have had prior to the abortion.

(3) Number and type of abortions patient may have had prior to this abortion.

(4) Name and address of the facility where the abortion was performed.

(5) Gestational age of the unborn child at the time of the abortion, if known.

(6) Type of abortion performed, if known.

(7) Nature of complication or complications.

(8) Medical treatment given.

(9) The nature and extent, if known, of any permanent condition caused by the complication.

(i) Penalties. --

(1) Any person required under this section to file a report, keep any records or supply any information, who willfully fails to file such report, keep such records or supply such information at the time or times required by law or regulation is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

(2) Any person who willfully delivers or discloses to the department any report, record or information known by him to be false commits a misdemeanor of the first degree.

(3) In addition to the above penalities, any person, organization or facility who willfully violates any of the provisions of this section requiring reporting shall upon conviction thereof:

(i) For the first time, have its license suspended for a period of six months.

(ii) For the second time, have its license suspended for a period of one year.

(iii) For the third time, have its license revoked.

§3215. Publicly owned facilities; public officials and public funds.

. . . .

(e) Insurance policies. -- All insurers who make available health care and disability insurance policies in this Commonwealth shall make available such policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest. Any such policy shall contain a premium which is lower than that which is contained in policies offering additional abortion coverage.

. . . .

SEITZ, Chief Judge, dissenting in part.

I concur in most of the majority's opinion, but I write separately for two reasons. The first is because in several instances the majority has struck down provisions of the Abortion Control Act that I believe are constitutional. Second, I am

especially concerned about the two instances, involving subsection (2) of section 3210 and section 3211, where the majority has addressed issues which I believe are not raised by the plaintiffs on appeal. It is my view that when deciding the constitutionality of a state statute it is particularly important that a federal court refrain from reaching out for issues not before it. In order to make any positions clear, I will address separately each section of the act addressed by the majority, using the same headings as in the majority opinion.

Section 3203: Definitions

Abortion. I join the majority in construing the definition of "abortion" as incorporating the intent requirement of 18 Pa. Cons. Ann. §302(b)(c).

Physician. I join the majority in striking the definition of "physician" in the Abortion Control Act and applying the definition in the Statutory Construction Act, 1 Pa. Cons. Stat. Ann. § 1991.

Section 3205: Informed Consent

The Supreme Court's decisions in the Akron and Ashcroft cases make it clear that the 24-hour waiting period and the physician-only counseling requirements are unconstitutional. Pennsylvania conceded the unconstitutionality of these provisions. I therefore join the majority opinion to the extent that it strikes down these portions of section 3205.

The majority goes further, however, and strikes down subsection (a)(2) of section 3205 as well. I believe that this subsection is

constitutional. A similar requirement at issue in Akron was struck down only because the information had to be provided by a physician. The information itself, however, was "not objectionable." Akron, 103 S. Ct. at 2501 n.37. In Pennsylvania the information may be given by a non-physician counselor, so the objection the Supreme Court had to the Akron statute does not apply here. The majority's reliance on footnote 37 of the Akron opinion to support its refusal to sever and sustain subsection (a)(2) is misplaced. The same is true of the language from the Akron opinion quoted by the majority suggesting that subsection (a)(2) is an attempt to sway the woman against having an abortion or compels the physician to give information irrelevant to her personal circumstances. None of the language

quoted in the majority opinion is addressed to those provisions of the Akron statute resembling subsection (a)(2).

In short, I believe that the Akron decision does not compel the conclusion that subsection (a)(2) is unconstitutional. I therefore dissent from that part of the majority opinion striking down this subsection. Section 3206: Parental Consent

I concur in the majority's disposition of the attacks on this section.

Section 3207(b): Abortion Facilities, Reports

I join that part of the majority opinion rejecting plaintiffs' attack on section 3207.

Section 3208: Printed Information

The majority strikes down this section because it is "inextricably

intertwined" with section 3205, which the majority strikes down in its entirety. The sole link between sections 3208 and 3205 is a cross reference in subsection (a)(2) of section 3205. It appears to me that section 3208 could stand on its own, and so I do not believe that a mere cross reference in section 3205 so taints section 3208 that it must fall at well. The majority does not discuss severance other than to say that there "is no certainty of any legislative intent that section 3208 should stand alone." This approach classes with the severability clause included in the Act, which provides that "if any provision of this act . . . is held invalid . . . the remainder of this act or chapter . . . shall not be affected thereby."

I also dissent from this part of the majority opinion because I believe

that subsection (a)(2) of section 3205 is constitutional. Since the reference to section 3208 is in a part of section 3205 that I would sustain, in my view section 3208 is not "inextricably intertwined" with an unconstitutional provision.

Finally, I believe that section 3208, standing alone, is constitutional. The only provision which could be open to any dispute is subsection (b), which requires that the printed information describe "the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments." Statutes of other jurisdictions requiring physicians to read descriptions of the unborn child to the mother prior to her consenting to an abortion have been struck down on the grounds that they interfere with the physician's exercise of his best medical

judgment, that they require presentations in such lurid detail that they cause the woman mental anguish, that they represent impermissible attempts to sway the woman against abortion, or that they require the physician to state accurately that which cannot be known with certainty. See, e.g., Akron, 103 S. Ct. at 2500-01; Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1021 (1st Cir. 1981); Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980); Leigh v. Olson, 497 F.Supp. 1340, 1346 (D. N.D. 1980); Margaret S. v. Edwards, 488 F. Supp. 181, 208-09 (E.D. La. 1980).

The Pennsylvania statute avoids these problems because it simply provides the woman the right to view the printed materials if she so desires.

There is no requirement that she view the materials or that the physician state the precise characteristics of the unborn child. There is no requirement that the materials go into detail likely to shock the mother. The statute specifically limits the printed materials to "scientifically accurate" information, which presumably would exclude such offensive detail as the unborn child's sensitivity to pain. Akron, 103 S.Ct. at 2500 n.34. Finally, nothing in the statute prevents the physician from advising that the woman not view the materials, or disputing or supplementing them with his own information. I conclude that subsection (b) of section 3208 does not share the infirmities of the statutes struck down in the cases cited in the previous paragraph, and therefore I would sustain it.

Section 3209: Hospital-Only Requirement

The Supreme Court in Akron struck down as "a significant obstacle in the path of a woman seeking an abortion" a requirement that all abortions after the first trimester be performed in a hospital, 103 S. Ct. at 2495. Pennsylvania has conceded the unconstitutionality of section 3209, which imposes a similar requirement. I join the majority in striking down this section.

Section 3210: Abortion After Viability

Prohibition. I join that part of the majority opinion holding that the Supreme Court's decision in the Simopoulos case compels us to construe section (a) of section 3210 as placing the burden of proving lack of medical necessity on the prosecution.

I do not join that part of the majority opinion rejecting the challenge

to the definition of "maternal health." My reading of the briefs does not disclose that plaintiffs have raised this issue on appeal.

Finally, I dissent from that part of the majority opinion discussing the chilling effect of the statute. The purpose of a criminal statute is to chill certain conduct. I believe that the only chilling which can concern us is that caused by some unconstitutional feature of the statute, such as vagueness of overbreadth. By incorporating an intent requirement into the definition of "abortion" found in section 3210 to place the burden of disproving medical necessity on the prosecution, we have addressed the specific sources of chilling identified by the plaintiffs.

The Supreme Court has made it clear that there is a permissible scope

of state regulation of abortion. We can give no remedy when the physician, through his own overreacting, is chilled by regulations within this permissible scope. To the extent that the majority is suggesting that the mere existence of the Abortion Control Act, although constitutional, chills physicians, I believe that the problem is one which we may not remedy. To the extent that the majority is suggesting that other constitutional problems not addressed here may, if proved in later litigation, lead to a finding of impermissible chilling, I believe that we should await that future case. In either event I cannot join that part of the majority opinion addressing this issue.

"Significantly greater" risk. I join that part of the majority opinion holding subsection (b) of section 3210 unconstitutional.

Second physician for viable fetus. The majority strikes down subsection (c) on the ground that it contains no exception to the second-physician requirement in the case of a medical emergency. I dissent from this part of the majority opinion. I agree with the majority that the Ashcroft decision requires that in order to be constitutional, a second-physician requirement must include an exception for emergencies. I believe, however, that such an exception is clearly expressed in subsection (a), which provides that "[it] shall be a complete defense to any charge brought against a physician for violating the requirements of this section . . . that the abortion was necessary to preserve maternal life or health." (emphasis added). The plain meaning of the word "section" is to refer to section 3210 as a whole,

including subsections (a), (b) and (c). This conclusion is bolstered by the legislature's use of the term "subsection" in subsections (b) and (c) when referring to matters limited to each of those subsections.

Had the legislature meant to limit the applicability of the medical emergency defense to subsection (a), it stands to reason that the legislature would have referred to "this subsection" rather than "this section." The majority ignores the use of the different terms and holds that to apply the medical emergency exception in subsection (a) to the second-physician requirement of subsection (c) would "rewrite the statute." However, since it is evident to me that the legislature was aware of the distinction between section and subsection, I believe that we should give effect to the plain

wording of the medical emergency exception. I would hold that it applies to the second-physician requirement in subsection (c), and therefore I would sustain subsection (c).

Section 3211: Viability

I dissent from that part of the majority opinion striking down section 3211 because I do not believe that a challenge to this section is before us. Section 3211 is not mentioned by the plaintiffs in the complaint in the district court, and I cannot find a challenge to it in the briefs filed in this court.

Section 3214: Reporting

The majority strikes down subsections (a), (b), and (h) of section 3214. I dissent from this part of the majority opinion because I do not regard these reports as having a legally significant impact on the abortion

decision. The majority first compares the requirements of section 3214 to those permitted by the Supreme Court in the Danforth case and finds Pennsylvania's requirements much more onerous. The Missouri statute sustained in Danforth provided for "the compilation of relevant maternal health and life data" without specifying what this means. 428 U.S. at 87. Based on this broad description in the Missouri statute I am unable to determine, as the majority apparently has, that the Missouri reporting requirements are more or less onerous than Pennsylvania's. In any event, in my view most of what Pennsylvania asks for in subsections (a) and (h) is "relevant maternal health and life data." I also believe that it meets the Danforth standard that the reports be "reasonably directed to the preservation of maternal health." 428 U.S. at 80.

The majority next suggests that the Pennsylvania requirement is so burdensome as to constitute an unconstitutional restriction on access to abortion. I disagree. In my view, to constitute an unconstitutional restriction a reporting statute would have to compel the physician to go out of his way to collect data that he would not otherwise need to make an informed medical judgment. However, subsections (a) and (h) require the physician to report information which I believe most physicians would obtain as a matter of course, or which is easily obtained through simply questions or observation. I am not persuaded that requiring the physician to report information of this sort imposes a legally significant burden.

The majority then states that the reporting requirements are

unconstitutional because they will increase the costs of an abortion. The majority relies on paragraph 194 of the stipulation of facts, which states that the reporting requirements of section 3214 will cause the price of an abortion to increase by an unspecified amount. To me, this is an insufficient basis on which to conclude that a legally significant burden is imposed. The stipulation refers to section 3214 as a whole, not to the three subsections which are struck down. We have no way of knowing what cost increase is attributable to these three subsections.[22]

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[22]In fact, it is not reasonable to infer that much of the cost increase complained of in the stipulation would be caused by the pathologist's exam required by subsection (c) of section 3214. Plaintiffs have conceded that this requirement is constitutional.

It is significant that we do not know what cost increase would be caused by the subsections under attack, because not every cost increase caused by regulation imposes a legally significant burden on abortion. For example, five Justices concluded in the Ashcroft case that a required pathologist's examination that would add $19 to the cost of an abortion did not impose a legally significant burden. There is no evidence that we are dealing with a cost increase even approaching that magnitude. The majority has relieved the plaintiffs of their burden of proof by presuming that we are dealing with a cost increase significant enough to be unconstitutional. In my view doing this does not accord with the presumption of constitutionality favoring section 3214.

My belief, based on this record, that these subsections of section 3214

are not unconstitutional for the reasons stated by the majority compels me to reach the other ground advanced by the plaintiffs, that the reporting requirements violate the physician's and patient's privacy. I reject this contention. Subsections (e)(1) and (2) ensure that the identity of both the physician and the patient will not be available to the public. In addition, the pertinent statutory provisions prohibit including the name of the patient in the reports required by subsections (a) and (h). Finally, because I believe that the reporting requirement in subsection (a) is constitutional, I believe that subsection (b) requiring the transmittal of the reports should be sustained. I therefore dissent.

Section 3215(e): Insurance

I join the majority in holding that Morgan Plant has standing to challenge subsection (e) of section 3215 and in striking down that subsection.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 82-1785 and 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellants in No. 82-1785
and Cross-Appellees in
No. 82-1856

V.

RICHARD THORNBURGH,
H. ARNOLD MULLER,
HELEN B. O'BANNON,
MICHAEL J. BROWNE,
WILLIAM R. DAVIS,

LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellees in No. 82-1785
and Cross-Appellants
in No. 82-1846

On Appeal from the District Court for
the Eastern District of Pennsylvania
(D. C. Civil No. 82-4336)

Present: SEITZ, Chief Judge, HIGGINBOTHAM and SLOVITER, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel March 11, 1983 and reargued before the same panel November 21, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered December 7, 1982, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Each side to bear its own costs.

ATTEST:

/s/ Sally Mrvos
Clerk

May 31, 1984
Certified as a true copy and issued in lieu of a forma mandate on July 6, 1984.

Test: /s/ M. Elizabeth Fergusen

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 82-1785 and 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

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in No. 82-1846

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges.

The petition for rehearing filed by appellees-cross-appellants in the above-entitled case having been

submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Aldisert and Judge Gibbons dissent from the denial of the petition for rehearing.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: June 28, 1984

American College of Obstetricians, etc. v. Thornburgh, Nos. 82-1785 and 82-1856

Statement by Judge Adams Sur Denial of Petition for Rehearing

Eleven years ago, the Supreme Court, in Roe v. Wade, 410 U.S. 113 (1973), struck down a statute imposing severe criminal sanctions on physicians who performed abortions. That statute, in the eyes of the Court, impermissibly interfered with a woman's decision to terminate her pregnancy, thus abridging the fundamental right of privacy that guarantees freedom of choice in marriage and family life. Today, in the decision we are reviewing on a petition for rehearing, the majority declares a Pennsylvania statute constitutionally infirm because, among other reasons, it requires that physicians supply printed material to women seeking abortions that need be read only if the patient so desires.

I agree with the majority that certain portions of the statute cannot be reconciled with recent Supreme Court decisions, a judgment that even the State concedes. However, to strike down the statute practically in its entirety is to forget how tightly constitutional adjudication is bound to the facts of those cases in which new constitutional principles are announced or developed. Such sweeping rejections of legislative enactments often result from the common tendency to generalize the holdings of cases and to drive those generalizations to an extreme which, while perhaps exhibiting conceptual purity, belies the emptiness of logical constructs devoid of empirical content. All rights by their nature tend to declare themselves absolute to their logical extreme; yet, in fact, they are all limited by competing rights as well as policy considerations.

The Supreme Court has identified two compelling state interests which, when pursued with scrupulous care, may justify regulations governing the exercise of the fundamental right to an abortion: the health of the pregnant woman seeking an abortion and the protection of fetuses capable of meaningful life. City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2491-92 (1983). The Commonwealth of Pennsylvania has chosen to protect those interests by, for instance, specifying some of the information that must be made available before a woman's consent to an abortion is legally informed and by providing that a second physician, absent an emergency, shall attend the operation if a child might survive the abortion. Not all might agree with these measures, but a law is not void simply because it "may

seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." Otis v. Parker, 187 U.S. 606, 608 (1903) (Holmes, J.). The Constitution does not embody a particular set of ethical principles, and judges are under a special duty in passing on the legitimacy of legislation not to constitutionalize that which legally speaking is in the end only a personal preference.

I vote for rehearing in this matter not only for the reasons set forth by Judge Weis, but also because, as I view it, the case involves questions of more than usual importance whose resolution requires that competing, legitimate interests be delicately balanced.

STATEMENT OF JUDGE WEIS
SUR PETITION FOR REHEARING

As an intermediate appellate court, we are bound to apply the Supreme Court's standards to the provisions of the Pennsylvania statute. However, I have serious reservations about the fashion in which the panel majority applied those standards to the many issues presented by this case. In the present procedural posture, however, I will discuss only a few of the questions that I believe warrant in banc consideration.

One major concern is the matter of "informed consent." I confess that I find some incongruity in the Supreme Court's exclusion of certain information that has a definite and direct bearing

on whether the consent of the woman is truly knowledgeable. See Akron v. Akron Center for Reproductive Health, 51 U.S.L.W. 4767 (June 15, 1983). Suppression of objective information highly pertinent to important decisions is indeed a disturbing and unwelcome concept in American law. In expanding that notion beyond the bounds set by the Supreme Court, the panel majority contravenes the teachings of Akron and other cases. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976) ("The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.")

Although Akron disapproved state requirements that were "designed not to inform the woman's consent but rather to

persuade her to withhold it altogether," the Court did not prohibit all mandatory disclosures. Found "not objectionable" were some of the items that are listed in the Pennsylvania statute. Compare Akron, 51 U.S.L.W. at 4775 n.37 with 18 PA. CONS. STAT. ANN. §3205.

Moreover, the panel majority has ignored significant differences between the information specified in the Akron and Pennsylvania enactments. The Akron ordinance was overturned because it exhibited specific objectionable characteristics, none of which are present in the Pennsylvania statute. Here, the legislature has limited the required disclosure of risks to instances "when medically accurate," 18 PA. CONS. STAT. ANN. §3205(a)(1)(iii), thereby preserving the professional judgment of the physician. Nor can the Pennsylvania provision fairly be

characterized as an attempt to misleadingly overstate the nature of abortion as a medical procedure.

In referring to the anatomical and physiological characteristics of the unborn child, the Pennsylvania Act provides only that materials on this subject be made available to the woman, who is free to choose whether she will view them. The Act states that the materials "shall be objective, nonjudgmental and designed to convey only accurate scientific information." 18 PA. CONS. STAT. ANN. §3208(a)(2). Thus, the statute does not admit of the overreaching found objectionable in Akron.

To the extent Pennsylvania requires that information be given on the gestational age of the fetus, adoption, and the availability of assistance during pregnancy and after

childbirth, the statute incorporates only matters that the Court in Akron found "not objectionable." Given these circumstances, I am at a loss to understand why the Pennsylvania informed consent provisions are held to be beyond permissible limits.

Applying the Akron yardstick to the Pennsylvania statute requires a review of the various provisions of the Pennsylvania statute independently, and on their own merit. That has not been done here; nor has there been persuasive analysis of why the severability provision of the Pennsylvania statute should not be honored.

The statute here also differs from the Akron ordinance in establishing civil as well as criminal consequences. In a severable clause, Pennsylvania provides that compliance with the required disclosures is a defense for

the physician in a civil malpractice suit. See 18 PA. CONS. STAT. ANN. §3205(d). A state's imposition of criminal sanctions that effectively deny the exercise of a constitutional right is quite a different jurisprudential consideration than setting standards for civil damage liability. No recognition of that distinction is apparent in the majority's approach. Cf. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 88 (1976) (Missouri statute provided that "[n]othing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.").

A second major concern is the treatment of the parental consent provisions. See 18 PA. CONS. STAT. ANN. §3206. Although this section is not

rejected as facially unconstitutional, implementation is enjoined pending promu' ation of rules by the state Supreme Court. I perceive no necessity to await such rules.

The Pennsylvania act is not less detailed in any constitutionally significant way than the parental consent provisions upheld by the Supreme Court in Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 51 U.S.L.W. 4783 (June 15, 1983). Compare 51 U.S.L.W. 4784 n.4 with 18 PA. CONS. STAT. ANN. §3206. The Pennsylvania statute provides the minor with a judicial alternative to parental consent and gives her the opportunity to demonstrate sufficient maturity to make the abortion decision. Absent that demonstration, the judicial officer is required to determine whether an abortion is in the woman's best

interests. These are the essential requirements enunciated by the Supreme Court. See Akron, 51 U.S.L.W. at 4773.

The rules, which are to be issued by Pennsylvania's highest court "as may be necessary," are to address the confidentiality and promptness of the judicial procedures. 18 PA. CONS. STAT. ANN. §3206(h). The Act, however, already unambiguously provides that the "[c]ourt proceedings . . . shall be confidential and shall be given . . . precedence over other pending matters." Id. §3206(f). In highly specific language, the statute states that "in no case shall the court fail to rule within three business days of the date of application." Id. In addition, there is the requirement of a "sealed record" and the availability of an "expedited confidential appeal" for minors who are denied an abortion.

The statute as written satisfies the constitutional principles we are to apply to the issue of parental consent. That the Pennsylvania legislature has authorized "such rules as may be necessary" to supplement the statutory provisions does not permit this court to delay the effective date once federal constitutional requirements have been met. Although I have doubts that a construction to avoid constitutional infirmities is necessary here, one is easily accomplished by the reasonable assumption "that a state court presented with a state statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute consistently with constitutional requirements." Akron, 51 U.S.L.W. at 4774.

Along with Judge Seitz, I fail to understand why the majority strikes

down reporting provisions in section 3214 of the Pennsylvania Act when any cost increase attributable to these requirements is not known. That the majority may also have ruled on questions not raised by the parties causes concern that it has gone beyond the proper bounds for testing the validity of a state statute.

Perhaps most significant, in my opinion, is the panel's general failure to give proper weight to the legislative decision, as expressed in the statute, to protect the life and health of the woman and the child subject to abortion. The state is not disinterested in the abortion decision but has an important and legitimate interest in protecting "the potentiality of human life." Akron, 51 U.S.L.W. at 4770; Roe v. Wade, 410 U.S. 113, 162 (1973). Although the woman is protected

from "unduly burdensome interference with her freedom to decide" whether to abort, that right "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." Maher v. Roe, 432 U.S. 464, 474 (1977). "The Constitution does not compel a state to finetune its statutes so as to encourage or facilitate abortions." H.L. v. Matheson, 450 U.S. 393, 413 (1981).

Some appreciation of the magnitude of the state's interest may be gleaned from the fact that in Pennsylvania alone there were 59,288 abortions in 1983. In the United States, 1,574,000 abortions were performed in 1982. By way of contrast, the number of deaths from automobile accidents in the United States in that

same year, a state concern often referred to as "slaughter on the highways," was 43,945.

Our function as a federal court is to determine whether a state statute violates the federal constitution. If a statute may be construed to be constitutional, then we must adopt that interpretation. "Courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected." In re Gault, 387 U.S. 1, 71 (1967) (Harlan, J. concurring).

The issue in this case, only a few of which I have discussed, are important and significant. Because they have far-reaching effects and implicate the proper role of the states and the

federal courts, the full court should be review this case. Accordingly, I dissent from the order denying in banc consideration.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.	:	CIVIL ACTION
	:	NO. 82-4336
V.	:	
RICHARD THORNBURGH, et al.	:	

MEMORANDUM

HUYETT, J. December 10, 1982

I. INTRODUCTION

This is an action for declaratory and injunctive relief pursuant to the United States Constitution and 42 U.S.C. § 1983 in which the plaintiffs challenge the constitutionality of the Pennsylvania Abortion Control Act (Act), 18 Pa. Con. Stat. Ann. §§ 3201-3220. I have subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), & 1343(a)(4). Before me is plaintiffs' motion for preliminary injunction. On

December 7, 1982, because the Act was to take effect the next day, I issued my order and decree on the plaintiffs' motion. This opinion is the statement of my reasons for ruling as I did.

The plaintiffs are physicians, a physicians' professional organization, several clinic providers of first-trimester abortions members of the clergy and an individual whose health care and disability insurance provides comprehensive abortion coverage. The named defendants are seven state and local officials sued personally and in their official capacities (hereafter sometimes referred to collectively as the Commonwealth). Several physicians and a pregnancy counseling service moved to intervene as defendants and for appointment as guardians ad litem. The motion was denied, however, the applicants for intervention (hereafter

amici) were granted amici curiae status.

The act became law on June 11, 1982. Almost four months later plaintiffs filed their complaint. Plaintiffs' motion for a preliminary injunction was filed on October 29, 1982, almost a month after the complaint was filed. Following a conference in chambers on November 17, 1982, it was determined that December 2, 1982 was the earliest date by which the parties could fully brief the complex constitutional issues and prepare the factual presentation required by the motion. The parties' stipulation of uncontested facts,[1] their proposed findings of

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[1]The parties' stipulation is cited throughout simply by paragraph symbol (para.) and number. The stipulation was entered into solely for the purpose of the motion for preliminary injunction. My adjudication is likewise limited.

fact and conclusions of law were submitted to me on November 30, 1982. A conference was held in chambers on December 1, 1982. On December 2, 1982, I held a hearing on plaintiffs' motion. Because of the parties' comprehensive stipulation of uncontested facts, no testimony or evidence was submitted at the hearing. Counsel for the plaintiffs, defendants, and amici presented oral argument. At the conclusion of the December 2, 1982 hearing, I took the matter under advisement. The effective date of the Pennsylvania Act is December 8, 1982.

The following constitutes my findings of fact and conclusions of law. Based upon my findings and for the reasons stated below, I conclude that the Act as a whole and the specific subsections challenged are constitutional with the exception of the

24 hour waiting period in § 3205.

I reach this conclusion after the most thoughtful consideration of these complex issues which time permitted.
As the procedural history of this case outlined above reveals despite the complexity and importance of the issues, this case has proceeded rapidly under pressure from the effective date of the Act. Within only 2 months of the filing of the complaint and just 6 days after the case was submitted to me, the Act which plaintiffs contend violates the Constitution became law.

Although the Pennsylvania Act and the challenge to it are recent developments in this circuit, some but not all of the subsections challenged here are similar to provisions the constitutionality of which has been litigated in the Six Circuit in Akron Center for Reproductive Health, Inc. v.

City of Akron, 651 F.2d 1198 (6th Cir. 1981) (Akron Center v. Akron) and in the Eighth Circuit in Planned Parenthood Association v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) (PPA v. Ashcroft). The decisions in Akron and Ashcroft are not consistent on a number of common issues. These decisions have tended as much to obfuscate as to enlighten my analysis of the present case. Both decisions are before the Supreme Court which heard argument in the cases on December 4, 1982. 51 U.S.L.W. 3433 (U.S. Dec. 7, 1982).

While the pressure of the effective date is real and the plaintiffs are entitled to an adjudication of their request for relief pendente lite, it is with a certain level of frustration that I observe that within six months to a year the Supreme

Court may issue an opinion which will be likely to resolve many of the issues that I have held under advisement for just a few days. Further, I must agree with Judge Adams' observation in Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554, 586 (E.D. Pa. 1975) (Adams, J., concurring and dissenting), that "it is open to some doubt whether the courts are the institution best equipped to resolve the complex societal interests that exist in the abortion field." This is an area perhaps better left in the hands of popularly elected legislators. In approaching this decision, I was mindful of Judge Adams' admonition in Fitzpatrick that courts should be "reluctant to leap ahead too quickly to interdict states from legislating respecting abortions when, in the accumulative informed judgment of the legislators, such enactments are

necessary to serve legitimate interests of populance." Id.

II. STANDING

The plaintiffs in this action can be divided into five different groups. The defendants challenge the standing of only one of those groups, clergymen who sue in individual and representative capacities.

Plaintiff physicians have standing to assert both their own rights and those of their women patients to challenge the constitutionality of the sections at issue in this case. Singleton v. Wulff, 428 U.S. 106 (1976), Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Plaintiff American College of Obstetricians and Gynecologists, Pennsylvania Section, an organization of obstetricians and gynecologists, has standing to represent the interests of its members and of their patients. Hunt v. Washington State Apple Advertising

Commission, 432 U.S. 333 (1977). Plaintiff medical providers similarly have standing to raise the constitutional rights of their customers. Women's Medical Center v. Roberts, 512 F. Supp. 316 (D.R.I. 1981).

The defendants have not challenged the standing of plaintiff Morgan Plant. Plant is an individual who currently purchases and will continue to purchase health care and disability insurance, which comprehensively covers abortions, from an insurer in Pennsylvania. Plant sues on her own behalf and on behalf of all persons similarly situated. It appears that Plant does not have standing to challenge § 3215(e), because there is no evidence that comprehensive insurance premiums will be more costly after the Act goes into effect than before the enactment as a result of the challenged

provision. Consequently, Plant has not shown the "injury in fact" required by Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) and its progeny. Nevertheless, in the absence of briefing or oral argument on this point by any of the parties, and in light of the time constraints involved, I will reach the merits of the insurance claim.

Finally, I conclude that plaintiff clergymen do not have standing either as individuals or on behalf of women whom they counsel. Plaintiff clergymen fail to meet the constitutional requirements for standing, in both individual and representative capacities, articulated in free exercise cases. I find that the challenged provisions have no direct impact on the plaintiff clergymen as individuals, because the Act has no

provisions which directly or indirectly concern religious counseling. Consequently, I conclude that the clergymen have failed to meet the requirements of injury in fact required in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

Further, I conclude that the clergymen do not have standing in a representative capacity. A free exercise claim ordinarily requires individual participation. Harris v. McRae, 448 U.S. 297, 321 (1980). "It is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." Abington School District v. Schempp, 374 U.S. 203, 233 (1963). In Harris v. McRae, the Supreme Court held that representatives of a division of the United Methodist Church did not have

standing to sue on behalf of women who seek abortions for religious reasons. Consequently, a free exercise claim in this case can be pursued only by a woman who seeks "an abortion under compulation of religious belief." 448 U.S. at 320.

I, therefore, conclude that the plaintiff members of the clergy lack standing. Thus, I need not address the merits of the plaintiffs' arguments concerning the Free Exercise Clause because no plaintiff has standing to raise it.

III. STANDARD OF REVIEW

The standard of review applicable to each of the plaintiffs' challenges must be determined. The parties stated at oral argument that they are in disagreement over the proper standard. The plaintiffs contend that if the state has imposed a legally significant burden on a fundamental right such as a woman's right of privacy, then the burden must be related to a compelling state interest and the statutory section imposing the burden must be narrowly drawn to achieve that compelling interest. The Commonwealth contends that the appropriate inquiry is whether the Act imposes an "undue burden."

I do not believe that a meaningful distinction can be made between the plaintiffs' "legally significant burden" and defendants' "undue burden." I will employ the

plaintiffs' term.

If a legally significant burden on the exercise of a fundamental right is found to exist, then plaintiffs are correct that the compelling state interest standard is applied to determined the constitutionality of the statute imposing the burden. If no burden is found and no suspect class is involved, the issue is simply whether the state had a rational basis for making the classification contained in the statute. See J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 68 (1978).

The right to privacy which encompasses a woman's decision to terminate her pregnancy is a fundamental right. The imposition of a legally significant burden on that right would have to be justified by a compelling

state interest. See Maher v. Roe, 432 U.S. 464 (1977). In Roe v. Wade, the court held no compelling state interest justified a sweeping prohibition of abortion. In the first trimester, the Court concluded that little or no regulation was permissible. The Court went on, however, to conclude that even when judged against the demanding compelling state interest test, "the State's dual interest in the health of the pregnant woman and the potential life of the fetus [are] sufficient to justify substantial regulation of abortions in the second and third trimesters." Maher v. Roe, 432 U.S. at 472. Each interest, health of the woman and life of the fetus, becomes compelling at some point in the pregnancy. Roe v. Wade, 410 U.S. at 162-63. As the interest becomes "compelling" it justifies some

interference with the woman's fundamental right by way of regulation.

> In the second trimester, the State's interest in the health of the pregnant woman justifies state regulation reasonably related to that concern . . . . At viability, usually in the third trimester, the State's interest in the potential life of the fetus justifies prohibition with criminal penalties, except where the life or health of the mother is threatened.

Id. at 162-64.

Thus, the right to privacy which protects a woman's decision to terminate her pregnancy, while fundamental, is not absolute. In other areas of constitutional law, if the compelling state interest or "strict scrutiny" standard applies, it has nearly always been fatal to the state law or act under consideration. See L. Tribe, American Constitutional Law 1000 (1978). In the area of abortion decisions, a compelling state interest has been found to support

the challenged state law or act. See PPA v. Ashcroft, 655 F.2d 848 (8th Cir. 1981).

The fact that the right involved here is not absolute effects as well the analysis of whether a legally significant burden has been imposed which would trigger strict scrutiny. The Court has observed that "[a]lthough the state-created obstacle need not be absolute to be impermissible, we have held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'" Maher v. Roe, 432 U.S. at 473. See also Beal v. Doe, 432 U.S. 438 (1977). The Court has also stated that whether a state's regulation of abortion will be found to be constitutional will "depend upon its degree and the justification for it." Id. Thus, to

determine what constitutes a legal significant burden, one must look to the right allegedly burdened. In the case of the right to privacy to choose an abortion, the existence of a legally significant burden will be a matter of degree.

IV. 24-HOUR WAITING PERIOD - § 3205

Section 3205 of the Act requires that there be a 24-hour waiting period between the time a woman seeking an abortion is provided the information specified in that section and the time the abortion is performed. Section 3205 applies to all abortions regardless of which trimester of pregnancy is involved.

Plaintiffs contend that because this provision precludes the performance of an abortion, albeit for a temporary period, it imposes a legally significant burden on the effectuation of the abortion decision. Defendants contend that the 24-hour waiting period serves several useful purposes consistent with the Commonwealth's desire to further the public policy of encouraging childbirth over abortion. Additionally, the Commonwealth contends that a waiting period promotes truly informed

decision-making by the woman.

A mandatory 24-hour waiting period could have the effect of a much longer delay because of the nature of the working schedules of clinics and physicians. The 24-hour waiting requirement will require clinics and physicians to change their current practices and may increase the cost the clinics and physicians. They intend to pass along the increased costs to their patients. (para. 131) Moreover, this provision, because it requires at least two visits to an abortion provider, will require women who must travel long distances to make two trips or to incur additional expense for overnight lodging in order to effectuate their abortion decision. The economic impact of this provision is further increased as it may require women who are employed to take additional time off from work. (paras.

123, 124).

More fundamentally, the record demonstrates that the delay occasioned by this provision is contrary to the best medical interests of women seeking abortions.

National studies show that the earlier an abortion is performed, the safer it is. (para. 88) Each week of delay in performing an abortion increases the complication rate by 15 - 30% and the death rate by 50%. (para. 89) I find that the 24-hour delay imposed by the statute would have a substantial impact on the health of a woman seeking an abortion. The risks of complications and mortality increase substantially with each week of delay in the performance of the abortion. (para. 89) In some cases, the delays caused by this requirement may cause patients to enter into the second trimester of

pregnancy thereby substantially increasing the cost of the procedure and making the procedure more dangerous. (paras. 89, 123) Thus, a 24-hour delay, which stands to grow to a considerably longer delay because of the practices of the abortion providers, directly harms the medical interests of women.

Virtually every federal court which has been required to pass on similar provisions has found them unconstitutional. In Akron Center v. Akron, the Sixth Circuit stated that the obvious effect of a 24-hour wait is to impose upon the process of obtaining an abortion a delay which has no medical basis. 651 F.2d at 1208. The court concluded that although a period of delay before surgery is often beneficial, an inflexible requirement of

a 24-hour waiting period for an abortion does not serve the compelling state interest which is required under strict scrutiny analysis. Id.

Similarly, the court in PPA v. Ashcroft stated that a 48-hour waiting period requirement in that case was unconstitutional because it increased delay and delay increased the risk to the woman. 655 F.2d at 866.

The weight of authority holds and I conclude that the 24-hour waiting period which imposes a mandatory, temporary denial of an abortion is a legally significant burden on a woman's right to seek an abortion. There is no state interest during the first trimester of pregnancy which justifies this burden. Further, the 24-hour waiting period has a detrimental effect on the health interests of women seeking

abortions. Thus, it is contrary to the state's compelling interest in the second trimester, maternal health. For these reasons and based on the record produced before me, I conclude that the plaintiffs have shown a likelihood of success on the merits of their claim that the 24-hour waiting period is unconstitutional.

V. DOCTOR-ONLY REQUIREMENT - § 3205(a)(1)

Plaintiffs challenge the provision of § 3205(a)(1) requiring that the information required to be disclosed to the patient by subsection (a)(1) be imparted by the physician and not his agent.

The plaintiffs maintain that this "doctor-only" requirement will have a legally significant impact on the operation of medical providers which use trained counselors rather than physicians to discuss the abortion decision with patients and to secure a woman's informed consent. Plaintiffs argue that this requirement will result in an increase in the cost of abortions and will thereby restrict access to abortions without any legitimate state justification. Defendants, on the other hand, argue that the requirement does not interfere with the woman's abortion

decision is justified by a legitimate state policy of insuring physician-patient consultation, and thereby promotes the state's interest in the health of its citizens and is permissible under existing decisional law.

The parties have stipulated that the doctor-only requirement will require the plaintiffs to change their current practices. The parties further agree that such a change will increase costs to the plaintiff clinics, which costs will be passed along to women patients. (Stip. § 120)

Nevertheless, I conclude that the "doctor-only" requirement does not create a legally significant burden on the right recognized in Roe v. Wade. Section 3205(a)(1) does not interfere with the woman's fundamental right to

decide to have an abortion. Upon review of the stipulations of the parties, I am not convinced that the doctor-only requirement will require a presentation by the physician so lengthy as to become unduly burdensome or expensive. Further, the magnitude of any cost increase is speculative at best.

Instead, the only certain impact of the doctor-only requirement is that the physician's work may become more laborious. This result, however, does not burden the woman's abortion decision. Further, as defendants point out, a statute which makes a "physician's work more laborious and less independent" does not itself violate the Constitution." Whalen v. Roe, 429 U.S. 589, 604-605 n.33 (1977).

The doctor-only requirement fulfills the state's legitimate interest

in the health of its citizens by insuring that the abortion decision is made after a patient-physician consultation. In Ashcroft, the Eighth Circuit upheld a provision that required the attending physician to inform the woman of the particular risks associated with the abortion technique to be used, and alternatives to abortion. The court stated that the minimal requirement was "consistent with the principle that the abortion decision is one to be made by a woman and her physician, and advances the state's interest in insuring that the decision is made with 'full knowledge of its nature and consequences.'" 655 P.2d at 869, citing Planned Parenthood v. Danforth, 428 U.S. at 67.

For all these reasons and based on the record produced before me, I

conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the doctor-only requirement is unconstitutional.

VI. INFORMED CONSENT - SPECIFIC INFORMATION - § 3205(a)(1) & (2)

Section 3205(a)(1) requires that "except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if the woman is provided" with five pieces of information including "(1) the name of the physician who will perform the abortion; (ii) the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable; (iii) the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility; (iv) the probable gestational age of the unborn child at the time the abortion is to be performed; and (v) the medical risks

associated with carrying her child to term."

The plaintiffs maintain that the information required to be disclosed pursuant to § 3205(a)(1) imposes a legally significant burden on the abortion decision because the rigidity it injects conflicts with the need for individualized dialogue between doctor and patient. Plaintiffs also contend that this section interferes with the physician's ability to exercise his best medical judgment in determining the needs of his or her patient and satisfying those needs. Further, plaintiffs contend that the informed consent requirements of § 3205(a)(1) exceed those imposed to secure informed consent for other surgical procedures in Pennsylvania. Plaintiffs argue that the information is intended only to skew the

woman's abortion decision. The defendants, on the other hand, maintain that the informational requirements do not restrict the physician's ability to exercise his or her medical judgment or impermissibly exceed the informed consent requirements in other areas. The defendants also maintain that each of the requirements in § 3205(a)(1) is constitutionally permissible under existing decisional law.

A fundamental aspect of informed consent is that a patient be told of the options available to her. (para. 97). In general, physicians prefer broad disclosure of risks and options but agree that the disclosure process should not be a rote recitation, either orally or in writing of the risks of a medical procedure. Instead, the physician and the patient should have a thoughtful

discussion which involves great sensitivity, sublty, and sometimes complexity about a matter of great importance to the patient. (para. 99)

Thus, I find that consent cannot be truly informed unless the patient is given information regarding the risks inherent in the proposed procedure and the alternatives to the procedure. Women who undergo abortions are not always told of the alternatives to abortion or of the full nature and effect of the procedure they will undergo. (para. 102) In fact, some of the women who do undergo abortions would not have had an abortion if they were provided with all the information required to be provided by the Act. (para. 106)

Based on considerable case law which has addressed similar informa-

tional requirements necessary for informed consent, I conclude that the informational requirements of § 3205(a)(1) appear to be constitutional. In Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981), the court upheld similar informational requirements concerning the type of procedure which the physician intends to use to perform the abortion, the possible complications associated with the use of the procedure and with the performance of the abortion itself, the availability of alternatives to abortion and a statement that a woman's refusal to undergo an abortion does not constitute grounds for the denial of public assistance. The court found each of these pieces of information unobjectionable and relevant to the outcome of the woman's decision.

The Bellotti court invalidated, however, a requirement that the informed consent form contain "a description of the stage of development of the unborn child." Id. In addition to Bellotti, other courts have invalidated similar fetal description provisions. Each of the cases held unconstitutional a requirement that a woman read statements concerning "organic pain to the fetus" and view material describing "probable anatomical and physiological characteristics of the fetus." Similar provisions were held unconstitutional in PPA v. Ashcroft, 655 F.2d 848 (8th Cir. 1981). In Ashcroft and Akron, both currently pending in the Supreme Court, the information required to disseminated included graphic descriptions of the particular fetus.

Section 3205(a)(1)(iv) by contrast, requires a statement of "the probable gestational age of the unborn child at the time the abortion is to be performed," not a graphic description. In Women's Medical Center of Providence v. Roberts, 530 F. Supp. 1136 (D.R.I. 1982), the court upheld a provision requiring that a woman know the "probable gestational age of the fetus at the time the abortion is to be performed." The court emphasized that the provision did not require discussion of anatomical and physical characteristics of the fetus but rather, concerned information routinely supplied to women seeking abortions.

I conclude that the requirements of § 3205(a)(1) are neither contrary to accepted medical practice nor an attempt to skew the woman's abortion decision.

The provision does not require a physician to read any prescribed statement to the patient or require that the form be received or signed at the physician's office. Section 3205(a)(1) merely requires that the woman be provided with the information by the physician. Further the physician remains completely free to give any additional information regarding abortion to the woman. Thus, it appears that this requirement is "consistent with the idea that the abortion decision is one to be made by a woman and her physician and advances the state's interest in insuring that the decision is made with "full knowledge of its nature and consequences." PPA v. Ashcroft, 655 F.2d at 869, citing Planned Parenhood v. Danforth, 428 U.S. at 67.

In addition, although not raised at oral argument, the plaintiffs challenge § 3205(a)(2) in their brief.

Section 3205(a)(2) provides, inter alia, that the physician inform the woman (1) of her right to review printed materials describing the unborn child and (2) of agencies which offer alternatives to abortion. I conclude that these requirements appear to be contrary to the plaintiffs' argument, the provisions do not burden the woman's abortion decision, but merely inform the woman of the availability of additional detailed information of a general nature. I note that in Charles v. Carey, 627 F.2d 772 (7th Cir. 1980), the Seventh Circuit held that requiring women undergoing abortions to read printed materials "pertaining to abortion and how to contact various maternal assistance agencies," did not burden the woman's abortion decision. Id. at 783. The court did, however, invalidate a provision requiring the woman to view

materials produced by the state showing probable anatomical and physiological features of the fetus at various gestational ages. The court stated, in part, "The prospect of such 'required reading' for the woman who elects to abort a fetus because of serious genetic defects or because her own health is in danger is punitive to the woman and compromising to the physician's efforts to do what is best for her." Id. at 784. Section 3205(a)(2)(iii), however, involves no "required reading," but merely requires that the woman be informed that she may review the materials if she so desires.

In summary, the requirements of § 3205(a) do not interfere with the woman's fundamental right to decide to have an abortion Instead, the provisions merely achieve the legitimate state interest of insuring that the woman's

decision is made with full knowledge of the nature and consequences of her decision and after consultation with her physician. For all these reasons and based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that subsections (a)(1) & (2) of § 3205 are unconstitutional.

VII. PARENTAL-JUDICIAL CONSENT - § 3206

Section 3206(a) of the Act provides that, except in the case of a medical emergency, a physician shall not perform an abortion upon an unemancipated or incompetent minor without first obtaining the consent of one of the minor's parents or, in the case of an incompetent minor, the consent of her guardian. The Act specifically provides that in the event neither parent "is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient." 18 Pa. Con. Stat. § 3206(b). Section 3206(c) provides that if both parents of the minor refuse to consent, or if the minor prefers not to seek the consent of either parent, the minor may petition the court to authorize the abortion; the

court "shall" authorize the abortion "if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." Finally, according to § 3206(d), if the court determines that the minor is "not mature and capable of giving informed consent," the court is nevertheless required to authorize the abortion if the abortion "would be in the best interests of the [minor]."

The plaintiffs maintain that this requirement violates the minor's fundamental right to privacy by authorizing a third-party veto of her decision to undergo an abortion and must therefore be enjoined. In addition, the plaintiffs maintain that the judicial consent provision in § 3206 would present financial, transportation and logistical problems for teenagers,

resulting in time delays which will have serious health and emotional consequences for minors. Plaintiffs further claim that the section is void for vagueness. Finally, they argue that judicial approval serves no legitimate state interest since § 3204 of the Act already requires a physician to consider the age of his or her patient and determine whether in his or her best clinical judgment, the abortion is necessary.

The defendants contend, however, that the consent requirements of § 3206 comply with the most recent guidelines set by the Supreme Court regarding parental and judicial consent procedures. They maintain that the judicial approval procedures do not significantly burden the abortion decision, are not vague and express a legitimate state interest.

I conclude that the parental and judicial consent provisions of § 3206 are constitutional. I note that Justice Powell in Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), stated guidelines that a parental consent provision should meet in order to be constitutional. I have determined that the provisions of § 3206 meet the requirements of Bellotti II.

The Bellotti II standards are set forth in Justice Powell's opinion in that case. Justice Powell's opinion which was joined in by three other justices is a thoughtful consideration of permissible state action with respect to a minor's decision to seek an abortion. Although it is not a majority opinion of the court, it is persuasive authority. I have given it careful consideration and have determined that it is sound. I conclude that the

Pennsylvania Act is consistent with standards in Justice Powell's opinion in Bellotti II. I note also that since Justice White would have upheld the parental consent statute in Bellotti II which was more onerous to a minor seeking an abortion than the parental consent provision described by Justice Powell as acceptable, one could conclude that Justice White would uphold the parental-judicial consent provision of the Act.

In particular, Justice Powell wrote in Bellotti II that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." 443 U.S. at 643 (footnote omitted). Consequently, in Akron, the parental consent provision was held

invalid, because it failed to include a judicial approval alternative to parental consent. The Commonwealth, however, has provided such an alternative procedure in § 3206(c)-(f) of the Pennsylvania Act. Furthermore, under Bellotti II the minor must be able to obtain judicial authorization for the abortion if "she is mature enough and well enough informed to make her abortion decision . . . independently of her parents' wishes." The Act specifically complies with this portion of Bellotti II by providing that the court "shall . . . authorize a physician to perform the abortion if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." 18 Pa. Con. Stat. § 3206(c) (emphasis added).

Bellotti II also requires that the minor must be able to obtain authorization for the abortion under the alternative procedure "even if she is not able to make this decision independently, [but] the desired abortion would be in her best interests." 443 U.S. at 643-44. Again, § 3206(d) of the Act specifically provides that the court "shall" authorize the abortion "[i]f the court determines that the performance of an abortion would be in the best interests of the [minor]." Thus, § 3206 recognizes that every minor must have the opportunity, if she so desires, to go directly to a court without first consulting or notifying her parents. Further, unlike the provision at issue in Ashcroft, the court may not capriciously or arbitrarily withhold its approval. In Ashcroft, although the

statute included a judicial approval alternative, the provision improperly allowed the court to withhold its consent "for any good cause," in violation of the guidelines established in Bellotti II.

Finally, under Bellotti II, the alternative procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. Section 3206(f) of the Act specifically requires that court proceedings under § 3206 be confidential and be of adults. Consequently, the state has an interest in ensuring that the judgment of minors is informed and rational. The parental-judicial consent provision attempts to ensure that the minor's abortion decision is mature and well-reasoned by providing for judicial approval when parental consent is not

feasible.

I also conclude that the Act is not unconstitutionally vague because it fails to provide standards for determining when a minor is "mature" or "emancipated." I am satisfied that the words "emancipated" and "mature" are adequately defined by reference to existing state law on the subjects. In addition, as the Supreme Court indicated in Bellotti II, ". . . the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." 443 U.S. at 643-44 n.23. Indeed, although a "State generally may resort to objective . . . criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority," it is not required to adopt such "inevitably

arbitrary" criteria. 443 U.S. at 643 n.23 (emphasis added). The exact same reasoning applies to the concept of emancipation, which is merely a shorthand description for "criteria . . . for lifting some or all of the legal disabilities of minority." Id.

Thus, the parental-judicial consent provision of the Act appears to have been carefully crafted to comply with the guidelines established in Bellotti II and is not void for vagueness. Consequently, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of this claim.

VIII. REPORTING REQUIREMENTS - §§ 3207(b) & 3214

Section 3207(b) requires every facility in Pennsylvania at which abortions are performed to report to the Department of Health of the Commonwealth of Pennsylvania: (1) the name and address of the facility; (2) the name and address of any parent, subsidiary or affiliated organizations, corporations or associations; and (3) the name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility. Section 3207(b) further requires that the reports shall be open to public inspection and copying.

The plaintiffs maintain that these reporting and disclosure require-

ments are designed to focus public scrutiny on facilities, and owners of facilities, that perform abortions for the purpose of pressuring and harassing them. The defendants, however, maintain that the reporting provisions do not invade the privacy of facility owners because they are not more detailed than similar provisions relating to owners of other business entities. The defendants also maintain that the occurrence of any harassment as a result of the provision is merely speculative.

I conclude that § 3207(b) imposes no legally significant burden on the abortion decision. This provision has no effect upon the woman who is seeking an abortion. It does not unduly burden health providers who perform abortions. The information has no effect upon the woman who is seeking an abortion. It

does not unduly burden health providers who perform abortions. The information required by § 3207(b) is no more detailed or intrusive than the Commonwealth requires in other areas, such as the requirements involving articles of incorporation under the Nonprofit Corporation Law, Pa. Stat. Ann. tit. 15, § 7316 or the requirements involving the formation of limited partnerships under the Uniform Limited Partnership Act, Pa. Stat. Ann. tit. 59, § 512. I note that the state has a legitimate interest in ensuring that all businesses are financially responsible and law-abiding. I conclude that the record keeping provisions at issue help the state in achieving this interest. Further, there is no evidence in the record which would allow me to conclude that § 3207(b) is designed to harass or pressure abortion performing facilities

and their owners or that imposition of the requirements would result in pressure or harassment. Consequently, I conclude that § 3207(b) does not impose a legally significant burden on the abortion decision, and is related to a legitimate state interest.

The plaintiffs also challenge § 3214, which requires, inter alia, that for each abortion, the doctor must file a record including his identify, the identity of the referring physician, the name of the facility where the abortion was performed, and the womar's age, race, marital status, number of prior pregnancies and residence. Although some of the information in these r is available for public inspection, subsection 3214(a) requires that the report form shall not identify the individual patient by name. In addition, subsection (e)(1) provides

that statistical reports, prepared by the Department of Health based on the data gathered from reports filed pursuant to subsection (a), shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed. Further, subsection (e)(2) provides that before public disclosure of the reports filed pursuant to subsection (a) the department shall substitute a unique identification number for the names of the physicians which appear on the report, so that the identify of the physician filing the report shall constitute a confidential record of the department.

The plaintiffs maintain that compelled extensive disclosure of this information creates a legally significant burden on a woman's right of privacy. Defendants, on the other hand,

maintain that the record keeping requirements are not burdensome and are rationally related to the state's interest in protecting its citizens.

I note that a similar record keeping and reporting provision was upheld in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1975). Danforth upheld a requirement in which forms were supplied to abortion facilities and physicians, requiring compilation of data relevant to maternal health and life. The information on the forms was to be kept confidential and was to be used only for statistical purposes. The court considered the requirements permissible, because the requirements were reasonably directed to the preservation of maternal health and respected a patient's privacy and confidentiality. Although the information gathered pursuant to § 3214 is open

to the public, I conclude that the requirements of confidentiality in § 3214(e) regarding the identity of both patient and physician prevent any invasion of privacy which could present a legally significant burden on the abortion decision.

In addition, record keeping of the kind expressed in § 3214 is related to the state's interest in protecting the health of its citizens. The information compiled, like that sought in Danforth, may be a resource that is relevant to "decisions involving medical experience and judgment." Id. at 81. Further, I note that the provision requiring complications to be reported will provide data on the occurrence of specific risks and allow the Commonwealth to identify those doctors and clinics whose patients have suffered an inordinate number of complications.

Thus, the reporting requirement is related to the state's interest in maternal health.

Consequently, I conclude the reporting and record keeping requirements do not create a legally significant burden on the abortion decision, and serve a legitimate state interest. For all these reasons and based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the reporting requirements are unconstitutional.

IX. HOSPITAL-ONLY REQUIREMENT FOR POST-FIRST TRIMESTER ABORTIONS - § 3209

Section 3209 of the Act provides that all abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital except in cases where a medical emergency exists.

Plaintiffs contend that this requirement effectively eliminates, for many women, the ability to exercise their fundamental right. The plaintiffs argue that if hospitals are unavailable to perform post-first trimester abortions, a government imposed hospitalization requirement may act as a governmental veto of a woman's decision to seek an abortion. Defendants contend that hospitalization in the second trimester promotes maternal health when all methods of second trimester abortions are

considered. The risk of death caused increases with each week of delay. Thus, they maintain the hospitalization requirement is rationally related to the s compelling interest in protecting the life and health of t women undergoing abortions in the second trimester.

Physicians are currently required by regulation to perform all post-first trimester abortions in a hos In 1981, 48 hospitals in Pennsylvania performed post- trimester abortions. (para. 179) Thus, all post-first trimester abortions currently are performed in hospitals. There is no evidence that this has had a legally significant woman's right to obtain an abortion. Section 3209 would simply continue the status quo.

The hospital-only requirement is reasonably related to the state's interest in maternal health during the

second trimester of pregnancy. It is the professional opinion of plaintiff physicians that it is medically safe to perform dilation and evacuation (D & E) abortions on an out-patient basis. (para. 180) However, according to current professional standards established by the American College of Obstetrics & Gynecology in its Manual of Standards for Obstetricians, Gynecological Survey 1982, D & E abortions should be performed only in an out-patient surgical facility. (para. 174) To qualify as an out-patient surgical facility, a facility must have anesthesia capability, operating room equipment and other backup care facilities. (para. 175) Most abortion clinics at present do not qualify as out-patient surgical facilities. (para. 176) Hospitals do qualify. Since § 3209 does not require admission to a hospital, it is satisfied

if a D & E is performed at a hospital on an outpatient basis.

In addition to a D & E, an abortion may be performed by a saline ammniocentesis, prostaglodin installation, hysterotomy. These involve serious surgical procedures. Plaintiffs do not suggest that any of these methods can or should be performed in any environment other than a hospital. Considering all possible second trimester abortion procedures (and the Act applies equally to all such procedures) I find that hospitalization in the second trimester promotes maternal health.

In Akron Center v. Akron, the Sixth Circuit upheld a requirement that every abortion subsequent to the end of the first trimester of pregnancy be performed in a hospital. The court concluded that the requirement furthered

the compelling state interest in protection of maternal health. 651 F.2d at 1210. On similar grounds the Eighth Circuit in PPA v. Ashcroft upheld a similar requirement that all second trimester abortions be performed in a hospital. 655 F.2d at 853.

For all these reasons, I conclude that § 3209 is consistent with the state's compelling interest in maternal health during the second trimester of pregnancy. Therefore, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the hospital-only requirement is unconstitutional.

X. CRIMINAL PENALTIES - § 3210(a)

Section 3210(a) provides that

> any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree. It shall be a complete defense to any charge brought against a physician . . . that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

Plaintiffs challenge this provision on the basis that it establishes a legislative presumption that all post-viability abortions are criminal and places upon the defendant the burden of pleading and proving innocence.

I note that state regulation of fetal life after viability was expressly permitted in Roe v. Wade, 410 U.S. 113 (1973). In Roe v. Wade, the Supreme Court said that a state interested in

protecting fetal life after viability "may go so far as to prescribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-164.

With respect to the language of § 3210(a), I note that although the Act provides for criminal penalties for persons who "intentionally, knowingly or recklessly" perform abortions when the fetus is viable, the Act also provides for complete defenses to any criminal charges under § 3210(a) if the physician had concluded in good faith, in his best medical judgment, either that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

Plaintiffs' argument that § 3210(a) is unconstitutional because it requires the physician to plead and

prove his innocence is clearly erroneous based upon my reading of § 3210(a) and Ashcroft. In Ashcroft the Eighth Circuit upheld the provisions of a Missouri statute which provided criminal penalties for any person who knowingly performed an abortion upon a viable unborn child:

> As applied to the elements of this crime, the State would be required to provide that the physician was (1) aware he was performing an abortion; (2) aware this was a viable unborn child; and (3) aware the abortion was not necessary to preserve the life or health of the woman. When interpreted in this fashion, the statute does not impermissibly impinge on the rights of women and their physicians. It can be used to punish only those physicians who know that a fetus is viable and that the abortion is not necessary to the life and health of the woman. Such regulation is clearly permissible under Roe.

655 F.2d at 862 (emphasis in original). Similarly, § 3210(a) of the Act comes within the requirements of Roe v. Wade

and Ashcroft.

I conclude, therefore, that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the criminal penalties provision of the Act is unconstitutional.

XI. CHOICE OF ABORTION TECHNIQUE - § 3210(b)

Section 3210(b) provides with respect to abortions after viability that the physician must select the technique which provides "the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique."

Plaintiffs contend that this provision is unconst+tutionally vague. I disagree. None of the concepts would be foreign to the physicians upon whom the requirements of this section fall. Physicians are called upon daily to assess probabilities and degrees of risk whenever there are two or more

procedures from which they can chose to treat a patient. Section 3210(b) requires no more than the usual exercise of medical judgment.

I am also unpersuaded that an ambiguity exists between the terms born alive and viable which would lead physicians to use the mandated technique at an early stage of pregnancy. The caption of this section of the Act is "Abortion after viability." The provisions of this section clearly are only intended to apply after viability and not at the earlier stages hypothesized by the plaintiffs.

Plaintiffs also contend that this provision violates the substantive law enunciated in Roe v. Wade, 410 U.S. 113 (1973). The plaintiffs interpret the word "significantly" in the phrase "significantly greater risk" as being a

comparative term, indicative of degree. Thus, plaintiffs argue that this section requires a woman in the third trimester of pregnancy to accept some additional risk so long as it is not significant. The plaintiffs contend that this is inconsistent with Roe v. Wade which held that an abortion could not be prohibited even in the third trimester if necessary to preserve the health or life of the woman.

The court in Ashcroft upheld a provision similar to § 3210(b). The Ashcroft court stated:

> If the risk to the woman from the 'fetal survival method' is greater than the risk to her from alternative methods, the physician may choose an alternative. Implicitly, if the risk to the woman from the fetal survival method

> is less than or equal to the risk to her from available alternative methods, the physician must use the fetal survival method. Given the precision of this balance, the question is not whether the statute is vague, but whether the woman's constitutional rights are violated by a requirement that a fetal survival method must be used whenever the risks to the woman with that method are less than or equal to the risk from other possible methods.
>
> . . .
>
> By definition, if the risk is absolutely equal, the life and health of the mother are subjected to no greater risk by requiring use of the fetal survival method. By requiring use of such a method when the risks from it are less than or equal to the risk of alternatives, Missouri is within permissible bounds of regulation.

655 F.2d at 863 (footnotes omitted). The provision in Ashcroft, however, required the choice of a technique most likely to preserve the life of the fetus only when risk to the woman was no greater than the risk from another technique. Plaintiffs distinguish

Ashcroft contending that the Pennsylvania Act requires women to accept a slightly higher risk or somewhat higher risk while the statute in Ashcroft imposed no greater risk.

If "significantly greater risk" means that some additional risk must be accepted by the woman, I might be persuaded that the right recognized in Roe has been violated. After viability, Roe v. Wade permits a state to prohibit abortion except those abortions necessary to preserve the life or health of the woman. Thus, after viability, Roe v. Wade recognizes a class of abortions, those necessary to preserve the woman's life or health that are still entitled to a degree of protection. If § 3210(b) does impose some additional risk, as plaintiffs contend, then it burdens this group of post-viability abortions which are

entitled to some degree of protection as well as those post-viability abortions which the state could prohibit completely.

The plaintiffs' error is in their interpretation of the word "significantly" as used in § 3210(b). I am obliged to give the statute that reasonable interpretation which avoids the danger of constitutional invalidity. United States v. Harris, 347 U.S. 612 (1954); Planned Parenthood Association v. Ashcroft, 483 F. Supp. 679, 684 (W.D. Mo. 1980). I conclude that the phrase "significantly greater risk," reasonably interpreted, is not distinguishable from the statutory language in Ashcroft.

The reasonable interpretation of the term "significantly greater risk" which is consistent with constitutionality is that it is not a statement of

degree of risk. Significant can be understood to mean measurable or worthy or not worthy of consideration in contrast with insignificant, or not measureable or not worthy of consideration. Websters' Third New International Dictionary defines significant as "having meaning," "having or likely to have influence or effect," and "probably caused by something other than chance." When significant is defined in this way, the term "significantly greater risk" means any meaningful risk or any risk which would influence the exercise of medical judgment. Thus, the Act requires that after viability, the physician select the technique most likely to result in the live abortion of the viable fetus so long as there is no additional risk to the woman. So interpreted, the statute is constitutional for the reasons stated

by the court in Ashcroft. For all these reasons and based on the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the choice of technique provision in § 3210(b) is unconstitutional.

XII. SECOND-DOCTOR REQUIREMENT - § 3210(c)

Section 3210(c) provides, in pertinent part, that "[a]ny person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician."

Plaintiffs maintain that the second-doctor requirement will increase the cost and decrease the availability of some abortions. Plaintiffs also maintain that the provision is void for vagueness, in that it fails to give physicians the guidance necessary to enable them to conform their conduct to law. Additionally, plaintiffs maintain that § 3210(c) is overbroad, in that it requires the presence of a second

physician any time there is even a slight chance of a live birth. Consequently, plaintiffs assert that the requirement imposes a legally significant burden on a fundamental right and can be sustained only if it is necessary to further a compelling state interest.

The defendants, on the other hand, maintain that any increase in the cost of abortion procedures as a result of the second-doctor requirement does not constitute a legally significant burden on the abortion decision. They further argue that § 3210(c) gives physicians fair notice as to when a second physician must be present and is narrowly drawn to apply only where a child may survive the abortion procedure.

I conclude that § 3210(c) is not vague or overbroad. The language "the possibility of the child surviving the

abortion," is sufficiently precise to afford the physicians guidance as to when a second physician is required. Section 3210(c) is distinguishable from a provision found objectionable in the Ashcroft case. Ashcroft invalidated a provision requiring a second physician to be present at the abortion of a viable unborn child to provide immediate care for the child. Ashcroft found the act overbroad, because it required a second physician even when the abortion was performed by means of the dilation and evacuation method, which method precludes survival of a viable fetus.

Section 3210(c), however, requires a second physician only when there is a possibility of the child surviving the abortion. Thus, a second physician would not be required where the means used to perform the abortion precludes survival by a viable fetus.

Section 3210(c), therefore, overcomes the overbreadth objection in Ashcroft.

There is no evidence that if this provision would cause the cost of an abortion to increase or that the increase would be so substantial that it would affect a woman's exercise of her right.

In addition, because the requirement applies only when there is a possibility that the child would survive the abortion, a compelling state interest in the life of a viable fetus justifies some additional cost which might result from the presence of the second doctor.

Consequently, I conclude that § 3210(c) is reasonably related to a compelling state interest and is not vague or overly broad.

Therefore, for all these reasons and based upon the record produced

before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the second-doctor requirement is unconstitutional.

XIII. INSURANCE COVERAGE FOR ABORTIONS - § 3215(3)

Section 3215(e) states that all insurers who make available health care and disability insurance policies in this Commonwealth shall make available policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest as well as policies containing comprehensive abortion coverage. The policies containing limited coverage must carry a premium which is lower than that which is contained in policies offering additional abortion coverage.

Plaintiffs challenge this section alleging that it requires higher premiums for policies containing comprehensive abortion coverage than for policies which contain only limited abortion coverage. Plaintiffs argue

that the section is a departure from the current law of Pennsylvania which mandates actuarial soundness in insurance rates. Defendants argue that the Act bears a rational relationship to the legitimate governmental interest of encouraging childbirth over abortion.

There are a number of factors which will influence the cost to the insurer of providing the two different kinds of abortion coverage. Such factors include the social, economic and religious characteristics of the population from which the insurer typically obtains its policyholders, the type of abortion technique typically used, the relative cost of maternity benefits as compared with abortions, the number of pregnancies in the population which are carried to full term, and the manner in which the coverage is sold. (para. 190)

The parties have stipulated that the cost to an insurer of providing a health insurance policy which covers abortion only in cases of threatened maternal death, rape or incest may be either higher or lower than the cost to the insurer of providing a health insurance policy which covers abortion comprehensively. (para. 189) This stipulation does not satisfy the plaintiffs' burden.

There is no evidence that the cost of health insurance offering only limited abortion coverage would actually be higher than comprehensive abortion coverage. There is no evidence that the state is arbitrarily requiring plaintiffs purchasing comprehensive abortion coverage to pay more or to pay a cost unrelated to the service they are being provided. There is no evidence that offering limited abortion coverage

at less than comprehensive coverage beyond what comprehensive coverage cost before the new Act. Even if there were an increased financial cost, there is no evidence that it would not be justified by an increased risk of claims.

Plaintiff have failed to demonstrate that § 3215(e) is a legally significant burden on a woman's privacy right to seek an abortion. The limitation of insurance coverage does not itself affect the abortion decision or its effectuation. Insurance coverage merely affects the source of payment. Full abortion coverage still may be purchased. Even assuming that increased insurance cost could constitute a legally significant burden, there is no evidence in this record that § 3215(e) will require purchasers of comprehensive coverage to pay more after the Act than they paid before the Act.

Section 3215(e) is rationally related to the public policy of the Commonwealth encouraging childbirth over abortion. In Maher v. Roe, 432 U.S. 464, 474 (1977), the Supreme Court held that a state may pass laws and regulations to further a state policy favoring childbirth over abortion where the state's action does not unduly burden the woman's right of privacy. Requiring insurers to offer a lower-priced policy containing an only limited coverage for abortion services is rationally related to the state policy favoring childbirth. It ensures that opponents of abortion will not be required to purchase coverage which they would not desire to use. It is consistent with the state policy favoring childbirth to provide this choice of coverage to the Commonwealth citizen.

Therefore based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the insurance coverage provision is unconstitutional.

XIV. OSTEOPATHS-§3203

Section 3203 defines "physician," as "any person licensed to practice medicine in this Commonwealth." The plaintiffs challenge this definition as depriving osteopaths of equal protection of the law. They maintain that this definition conflicts with the definition of "physician" in 1 Pa. Con. Stat. Ann. § 1991, defining physician as "an individual licensed under the laws of this Commonwealth to engage in the practice of medicine and surgery . . ., or in the practice of osteopathy or osteopathic surgery." The plaintiffs note that state law dictates that when two definitions are different and irreconcilable, the "statute latest in date of final enactment shall prevail." Id. § 1936. Since the Pennsylvania Abortion Control Act makes no reference to those who are licensed to practice

osteopathy, plaintiffs argue that the Act must be construed to apply only to medical doctors. Such exclusion of osteopaths, plaintiffs maintain, is arbitrary and irrational and violative of the Equal Protection Clause.

In analyzing plaintiffs' challenge, I note that a statute should be construed, if possible, to pretermit constitutional objections. See United States v. Clark, 445 U.S. 23 (1980), 2A Sands, Sutherland Statutory Construction § 45.11 (1973). Further, Pennsylvania law provides that, in determining legislative intent, it is presumed that the General Assembly intended that its acts be construed as consistent with the United States Constitution. 1 Pa. Cons. Stat. § 1922(3).

Regarding the specific language of the Act, I note that the term "medicine" is not defined in the Act.

The Statutory Construction Act, however, provides that "medicine and surgery", unless otherwise provided by law, is "[t]he art and science having for their object the cure of diseases of and the preservation of the health of man, including all practice of the healing art with or without drugs." Id. § 1991. I find that osteopaths are trained in a manner which qualifies them, upon proper licensing, to cure disease and perform such acts as are necessary to preserve and protect health. (para. 2, Affidavit Nos. 3, 6) Further, I note that the definition of "medicine and surgery" contained in the Statutory Construction Act is virtually identical to the definition of "osteopathic medicine and surgery" contained in the Osteopathic Medical Practice Act. See Pa. Stat. Ann. tit. 63, § 271.2.

In addition, I note that the legislature refers in the Act to the State Board of Medical Education and Licensure, which regulates medical doctors only. This reference does not affect the constitutionality of the Act, however. The General Assembly may have intended to modify the Board's powers. Alternatively, it may be necessary for the legislature to clarify its intent with regard to the enforcement mechanism. Nevertheless, the reference to enforcement by a body with authority over only one group of physicians does not lead to a conclusion that only the regulated group may perform abortions. The reference to the State Board of Medical Education and Licensure, therefore, does not render osteopaths unable to perform abortions.

Thus, based on the present record, it appears that osteopaths were

intended by the legislature to be included within the definition of "physician."

Therefore, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the Act is unconstitutional because § 3203 does not specifically mention osteopaths.

XV. OTHER PROVISIONS - ACT AS A WHOLE

Plaintiffs challenge other provisions in their brief which were not addressed at oral argument. Plaintiffs also present in their brief challenges to the Act as a whole which were not argued. I shall address briefly each of these arguments.

Plaintiffs contend that the definition of "abortion" contained in § 3203 of the Act is void for vagueness. I find that this contention lacks merit because it misconstrues the Act's definition of abortion and ignores the decisional law which has developed in this area of law. I have considered the cases cited by the parties, and for the reasons stated in defendant's brief at 16 - 24, I find that the definition of "abortion" in the Act is sufficient to give those affected by its terms notice of the conduct which is prohibited.

Plaintiffs attack §§ 3202(d) and 3213(d) of the Act on the grounds that they violate the religious freedom guaranteed by the first amendment. I conclude that this argument is without merit. The claim does no more than state an establishment clause challenge which has been rejected by the courts. Merely because a statute has an underlying purpose which coincides with the tenets of a particular religion does not mean that the statute violates the establishment clause. While the law generally provides accommodations for religious objections to medical care, no portion of the Act compels that particular medical care be provided. These sections which state that persons who, as a matter of conscience, refuse to participate in abortions may not be penalized for that refusal merely implement the constitutional protection

of the free exercise clause. The Act does not discriminate among religions simply because it takes measures, within the state's power, to regulate the practice of abortion.

In addition to challenging sections of the Act individually, plaintiffs argue that the Act is unconstitutional in its entirety. They contend that this is true because it imposes regulations on abortion procedures which are not imposed on other surgical procedures. In making this argument, plaintiffs ignore both specific precedent permitting regulation of abortion procedures and the historic power of the state to regulate the medical and other professions in the interest of public health. I find plaintiffs' argument to be without merit. It ignores both the special nature of abortion and the decisional

law in this area.

For all these reasons, for the reasons stated by the defendants in their memorandum of law, and based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claims that the Act as whole, and §§ 3203, 3202(d), and 3213(d) of the Act are unconstitutional.

XVI. CONCLUSION

I have applied the traditional criteria applicable to a motion for preliminary injunction: likelihood of success on the merits, irreparable harm if the relief is not granted, possibility of harm to the non-moving party, and where relevant, harm to the public. Given the importance of the right involved in this litigation, I have assumed that if the plaintiffs were able to show likelihood of success on the merits, then the irreparable harm requirement would be met. I conclude that in only one instance, the 24-hour waiting period, did the plaintiffs carry their burden of demonstrating likelihood of success on the merits.

With respect to each separate issue, I have considered the rights of the non-moving party. Where the plaintiffs failed to demonstrate

likelihood of success on the merits, respect for the democratic process which the defendants serve and which produced the Act was a strong, additional factor in favor of denying plaintiffs' motion. Where plaintiffs demonstrated likelihood of success on the merits, the rights of the non-moving party were overcome by the possibility of irreparable harm to a fundamental constitutional right. In addition to the rights of the non-moving party, I have considered the public interest. Since the public has an interest in respect both for fundamental individual rights and for the legislative process, public interest favored a resolution consistent with my decision on the likelihood of success.

My adjudication is limited to the plaintiffs' request for a preliminary injunction. It is circumscribed by the record produced by the parties and the

arguments advanced in the briefs on this motion. After applying the criteria for a preliminary injunction, I conclude that the only portion of the Act which the plaintiffs have demonstrated should be preliminarily enjoined is the 24-hour waiting period. In all other respects, the plaintiffs have failed to show a right to a preliminary injunction pending the outcome of the trial on the merits.

/s/ Daniel H. Huyett, 3d
Daniel H. Huyett, 3d, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.	:	NO. 82-4336
	:	CIVIL ACTION
V. THORNBURGH, et al.	:	

O R D E R

NOW, November 18, 1982, IT IS ORDERED that a preliminary injunction hearing shall be held at 10:00 a.m. on December 2, 1982, Courtroom 12-A, U. S. Courthouse, Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that:

1. FAILURE OF COUNSEL OR A PARTY TO COMPLY WITH ANY OF THE PROVISIONS OF THIS ORDER MAY RESULT IN DISMISSAL, DEFAULT, CONTEMPT, OR SANCTIONS AS MAY BE APPROPRIATE, INCLUDING THE AWARD OF REASONABLE EXPENSES AND COUNSEL FEES.

2. For the purposes of the preliminary injunction hearing, counsel for the parties shall meet and prepare a

complete and comprehensive stipulation of uncontested facts pursuant to paragraph (d)2(b)(2) of Local Rule of Civil Procedure 21. The parties shall reach agreement on all uncontested facts even though relevancy may be disputed. Such stipulation shall be submitted to the Court (chambers, room 12614) in an original and two (2) copies for approval not later than noon, November 30, 1982.

3. For the purposes of this preliminary injunction hearing, counsel for the parties shall meet and prepare a complete comprehensive statement of contested facts. The parties shall set forth each contested fact followed by their respective versions as to that fact. In addition, no party may contest a fact unless it is prepared to present evidence regarding that fact at the preliminary hearing. The statement of contested facts and the parties'

versions of the contested facts shall be submitted to the Court (chambers, room 12614) in an original and two (2) copies for approval not later than noon, November 30, 1982, along with the stipulation of all uncontested facts required in para. 1 above.

4. For the purposes of this preliminary injunction hearing, the parties shall submit to chambers not later than noon, November 30, 1982, in an original and two (2) copies, proposed findings of fact and conclusions of law.

5. Not later than noon, November 30, 1982, each party shall submit to the Court (chambers, room 12614) in an original and two (2) copies for approval a list of the names and addresses of all witnesses the party intends to call at the hearing. Each witness shall be identified and there shall be a brief statement of the

evidence the witness will present. In addition, a detailed summary of the qualifications of each expert witness shall be submitted.

6. All exhibits which the parties shall present at the hearing shall be shown to the other party prior to the hearing and shall be numbered in advance of the hearing; the Court at the hearing shall be supplied with copies of each exhibit in duplicate; each party shall prepare and submit to the Court at the commencement of the hearing a schedule in triplicate of such exhibits containing the number and a brief description of each exhibit; paragraph (d) 2(b)(6) of Local Rule of Civil Procedure 21 shall be complied with generally in respect to exhibits.

7. Counsel shall become familiar with and comply with "Procedures which shall govern in the Trial of cases

before Judge Daniel H. Huyett, 3rd."

8. Counsel shall become familiar with Local Rule of Civil Procedure 21 and follow generally the provisions of that Rule in respect to the hearing.

9. A procedural conference shall be held in chambers on December 1, 1982 at 1:30 p.m.

/s/ Daniel H. Huyett, 3rd
Daniel H. Huyett, 3rd, Judge

NOTE: ATTACHED ARE COPIES OF JUDGE HUYETT'S TRIAL PROCEDURES.

The severability clause of the Act provides as follows:

> The provisions of this act shall be severable. If any provision of this act, or the application thereof tc any person or circumstance, is held invalid, the remainder of this act, and the application of any provision hereof to any other persons of circumstances, shall not be affected thereby.

Act No. 1982-138, §5, 1982 Pa. Legis. Serv. 750, 794 (Purdon).

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CLERK

No. 84-495

In The
Supreme Court of the United States
October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

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No. 84-495

In The

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, et al.,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the appeal in this matter should be dismissed, and the papers treated as a petition for writ of certiorari, because the appeal is taken from an interlocutory order of the court of appeals reversing in part the district court's ruling on a request for preliminary injunction.

2. Considering the appeal papers as a petition for writ of certiorari, whether that petition should be denied because there are no special or important reasons which warrant the granting of that petition.

3. If this Court does not dismiss the appeal, whether the decision of the court of appeals should be summarily affirmed because it correctly applies prior decisions of this Court which establish the standards for determining the constitutionality of state statutes regulating abortions.

COUNTERSTATEMENT OF THE CASE

Appellants, officials of the Commonwealth of Pennsylvania who were defendants before the district court ("Commonwealth appellants"), seek to invoke this Court's jurisdiction by way of appeal to review portions of a decision entered on May 31, 1984 by the United States Court of Appeals for the Third Circuit.

Appellees, plaintiffs below ("appellees"), after filing their complaint, moved for a preliminary injunction against enforcement of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983) (the "Act"), because the Act, if enforced, would violate the constitutional rights of women seeking abortions in Pennsylvania. The district court, in its opinion issued prior to this Court's decisions in *Akron, Ashcroft* and *Simopoulos*,[1] concluded that appellees were likely to succeed solely with respect to their challenge to the 24-hour waiting period in Section 3205 of the Act. Accordingly, the

1. *City of Akron v. Akron Center for Reproductive Health, Inc.*, Nos. 81-746 and 81-1172, 103 S.Ct. 2481 (1983) *("Akron"); Planned Parenthood Association of Kansas City v. Ashcroft*, Nos. 81-1255 and 81-1623, 103 S.Ct. 2517 (1983); *("Ashcroft"); Simopoulos v. Virginia*, No. 81-185, 103 S.Ct. 2532 (1983) *("Simopoulos")*.

district court preliminarily enjoined only this section. (App. 270a-272a).

This decision was appealed to the Court of Appeals for the Third Circuit, which granted an injunction against enforcement of the entire Act pending review and deferred its final ruling on the appeal until this Court rendered its decisions in *Akron, Ashcroft* and *Simopoulos*. As a result, the court of appeals was able to apply this Court's most recent and most comprehensive explication of the constitutional standards which must be met by legislation regulating abortion. Indeed, the Act contains sections similar to many of the legislative provisions considered by the Court in those recent cases, so that the court of appeals was afforded explicit guidance in determining the constitutionality of numerous provisions of the Act.

In light of this Court's decisions, it was apparent that the district court had applied the wrong standard when it concluded that appellees were not likely to succeed on many of their constitutional challenges. Indeed, the Commonwealth appellants were forced to concede before the court of appeals that three sections of the Act were plainly unconstitutional under *Akron*, namely, the 24-hour waiting period and the physician-only counseling provisions of Section 3205 and the requirement of Section 3209 that all post-first trimester abortions be performed in a hospital. (App. 33a-36a).

With respect to other provisions that the Commonwealth appellants did not concede to be unconstitutional, the court of appeals determined the constitutionality of each challenged section on the basis of this Court's prior decisions, a careful analysis of the statutory language and

the record before it. The court of appeals did not reach out to find the entire Act unconstitutional, nor did it uncritically accept the Commonwealth appellants' position that only those sections conceded to be unconstitutional should be enjoined.

The court of appeals rejected the due process and equal protection challenges to the Act as a whole by construing the definitions of "abortion" and "physician" in Section 3203 so as to eliminate any constitutional infirmities. (App. 36a-43a). Similarly, in considering challenges to specific provisions of the Act, the court, where possible, avoided constitutional problems by construction. For example, the court of appeals concluded that Section 3210(a), imposing criminal penalties on physicians who perform abortions after the fetus becomes viable, would be facially constitutional if the Commonwealth had the burden to prove that the abortion was necessary to preserve the life or health of the pregnant woman or that the physician believed in good faith that the fetus was not viable. (App. 59a-68a). The court of appeals also held that Section 3206 of the Act, requiring that a minor obtain parental consent for an abortion or seek an order from the court permitting the abortion, was facially constitutional under *Ashcroft*, despite the variety of constitutional challenges to that provision asserted by appellees.[2] (App. 50a-56a).

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2. Contrary to the suggestion at the opening of the Commonwealth appellants' jurisdictional statement, the court of appeals did not find the parental/judicial consent provisions of § 3206 to be facially unconstitutional. It did, however, temporarily enjoin enforcement of § 3206 until the Pennsylvania Supreme Court acts, pursuant to the mandate of § 3206(h), to promulgate rules necessary to insure that judicial proceedings occur expeditiously and confidentially.

In other instances, the court of appeals refused to enjoin preliminarily sections of the Act because the record before the district court and the court of appeals was insufficient to establish that the provisions would interfere with the exercise of constitutionally protected rights. Thus, the court of appeals sustained the district court's refusal to enjoin enforcement of Sections 3207(b) and 3214(f), which require abortion facilities to file reports with the Commonwealth to be made available for public inspection and copying, despite appellees' contention that these sections will subject physicians, staff members, and women who seek medical services from those facilities to acts of violence, threats or harassment from forces opposed to abortion. (App. 57a-58a).

On the other side of the ledger, the court of appeals concluded that appellees had met their burden with respect to several specific challenges to the Act. Thus, the court enjoined enforcement of Section 3205 because, in addition to imposing a 24-hour waiting period and physician-only counseling, this section required the physician to recite a litany of specific pieces of information in all cases in order to secure "informed consent," thereby unconstitutionally prohibiting the physician from tailoring the information to the needs of each woman. (App. 43a-50a). The court of appeals also enjoined enforcement of Section 3210(b) because that section, on its face, would require a physician to elevate the life and health of the fetus over the life and health of the pregnant woman when performing a post-viability abortion. (App. 68a-71a). Similarly, the court of appeals enjoined the requirement in Section 3210(c) that a second physician be present during a post-viability abortion because that section does no

contain an exception for medical emergencies. (App. 71a-75a). The court also enjoined the reporting requirements of Section 3214(a), (b), (c) and (h), concluding that the Commonwealth appellants had failed to justify the detailed and burdensome reports mandated for each individual procedure. (App. 77a-82a). Finally, the court of appeals enjoined enforcement of Section 3215(e), which imposes certain limitations on health insurers in Pennsylvania that provide coverage for abortion procedures, because the Commonwealth appellants had afforded no justification sufficient to sustain this regulation.[3] (App. 83a-86a).

In light of this Court's decisions in *Akron* and *Ashcroft* and earlier cases, the court of appeals recognized that the determination of the unconstitutionality of several sections was a matter of statutory construction that did not require consideration of a factual record. The legal arguments necessary to the court's determination in these instances were fully presented by the parties in briefs and oral argument both before and after the decisions in *Akron*, *Ashcroft* and *Simopoulos*. Thus, while the matter came before the Third Circuit on appeal from a ruling on a motion for preliminary relief, these issues were ripe for a decision on the merits. In the interest of judicial economy and to provide guidance to the district court upon remand, the court of appeals held these sections unconstitutional as a matter of law. However, recognizing that there were still issues to be resolved by the district court after final hear-

3. For unexplained reasons, the Commonwealth appellants are not appealing the court of appeals' determination with respect to the constitutionality of the insurance provisions of § 3215(e) "at this time." (Jurisdictional Statement at 4 n.3).

ing, the court of appeals simply vacated the district court's erroneous ruling on the preliminary injunction request and remanded the matter for further consideration in light of its opinion. (App. 154a).

ARGUMENT

I. Because The Commonwealth Appellants Seek Review Of Only A Portion Of An Interlocutory Order Of The Court Of Appeals, This Court Should Dismiss The Appeal And Treat The Papers As A Petition For Writ Of Certiorari.

The Commonwealth appellants bring this matter as an appeal, invoking this Court's jurisdiction under 28 U.S.C. § 1254(2).[4] Given the procedural posture of this matter, however, the decision of the court of appeals lacks the degree of finality necessary to an assertion of this Court's jurisdiction by way of appeal.

This matter came before the court of appeals on appeal from an interlocutory order, entered on a stipulated record, largely denying a request for a preliminary injunction. Because of the manifest error in the district court's

4. This provision, which requires that the decision from which the appeal is taken hold invalid a state statute "as repugnant to the Constitution, treaties or laws of the United States," does not confer jurisdiction by way of appeal to review the decision of the court of appeals as to the parental/judicial consent provisions of § 3206 of the Act. Indeed, the court of appeals expressly concluded that "we cannot hold that the provision [§ 3206] is facially unconstitutional." (App. 54a-55a). The court's holding that implementation of this section must await the Pennsylvania Supreme Court's promulgation of rules consistent with the express mandate of § 3206(h) is subject to this Court's review only by writ of certiorari.

ruling, particularly considering this Court's subsequent decisions in *Akron, Ashcroft* and *Simopoulos,* the court of appeals vacated that interlocutory order and remanded the matter for further proceedings consistent with its opinion.

While the court of appeals was able to conclude that certain provisions of the Act do not, on their face, pass constitutional muster, much remains to be done by the district court on remand before a final decree determining all constitutional challenges can be entered. Particularly with respect to those issues which the court of appeals was unable to resolve because of an incomplete record, the parties must offer additional evidence at a final hearing on the merits. Indeed, the Commonwealth appellants do not consider the court of appeals' disposition final, even with respect to those provisions conceded to be unconstitutional before that court:

> The 24-hour requirement [of § 3205(a)(2)] is not pressed here by appellants in light of the Court's ruling in *Akron.* Nevertheless, as with all challenged provisions of the Act, appellants wish to preserve their right to offer evidence in support of the 24-hour requirement at trial. (Jurisdictional Statement at 22, n.13).

Given the strong resistence offered by the Commonwealth appellants to date, it appears inevitable that any final determination by the district court that provisions of the Act are unconstitutional will be appealed to the Third Circuit and, ultimately, to this Court. The Commonwealth appellants indicate as much in their Jurisdictional Statement when they note that they are not appealing the adverse ruling on the constitutionality of the insurance provision in Section 3215(e) "at this time." (Jurisdictional Statement at 4, n.3).

By its terms, 28 U.S.C. § 1254(2) does not limit the Supreme Court's jurisdiction by way of appeal to final orders of the various courts of appeals. However, the Court has construed Section 1254(2) and its predecessor provision as importing a finality requirement and dismissed appeals where that requirement was not met. *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901 (1956) *(per curiam); Slaker v. O'Connor,* 278 U.S. 188 (1929).

In 1962, Congress expanded the scope of 28 U.S.C. § 2103, which provides that an appeal improvidently taken to this Court be treated as a petition for writ of certiorari, to apply to appeals from the courts of appeals. In subsequent cases where an appeal was taken from an order of a court of appeals that was not final, this Court has dismissed the appeal and treated the papers as a petition for writ of certiorari, in accordance with Section 2103. *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975) (dismissing appeal from interlocutory order by court of appeals affirming district court's entry of preliminary injunction against enforcement of local ordinance); *City of El Paso v. Simmons,* 379 U.S. 497 (1965).

As in *Doran* and *City of El Paso,* the decision of the court of appeals is not final. The court of appeals did not direct the entry of final judgment in any respect; rather, it vacated the district court's order and remanded the matter for further proceedings. In the course of that remand, the Commonwealth appellants have expressed their intention to build a record which they contend will result in a finding that all sections of the Act are constitutional, in-

cluding those that they have previously conceded to be unconstitutional. Thus, there are substantial federal constitutional issues yet to be resolved by the district court. Accordingly, an exercise of this Court's appellate jurisdiction over those portions of the Third Circuit's decision that the Commonwealth appellants have elected to appeal at this time would likely result in piecemeal appeals which the requirement of finality is, in part, intended to prevent. *See Abney v. United States,* 431 U.S. 651, 656-57 (1977); *City of New Orleans v. Dukes,* 427 U.S. 297, 301-02 (1976); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949) ("The purpose [of the finality requirement in 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.").

Under these circumstances, this Court should dismiss the appeal, as it did in *City of El Paso* and *Doran,* and treat the papers filed by the Commonwealth appellants as a petition for writ of certiorari.[5]

II. Treating The Papers Filed By The Commonwealth Appellants As A Petition For Writ Of Certiorari, That Petition Should Be Denied.

As Supreme Court Rule 17 provides: "A review on writ of certiorari is not a matter of right, but of sound

5. A dismissal of the appeal at this interlocutory stage of the case will in no way preclude this Court from considering the merits of any issues that the Commonwealth appellants raise in an appeal or petition for writ of certiorari filed after final judgment. *See Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 365 n.1 (1973); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 488 n.6 (1968); *Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964).

judicial discretion, and will be granted only when there are special and important reasons therefor." Applying the considerations which normally govern this Court's exercise of that discretion to hear cases from courts of appeals, a writ of certiorari should not issue here.

The Commonwealth appellants do not suggest that the court of appeals' determination of the issues raised in this Court conflicts with any decision of another court of appeals or a state court of last resort, and appellants are not aware of any conflicting decisions.[6] As discussed in section III below, all of the constitutional questions resolved by the court of appeals have been recently considered by this Court. The court's resolution of these questions in the context of the Pennsylvania Act fully comports with this Court's prior decisions.

Another consideration governing review by certiorari from a court of appeals decision is whether the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). The Commonwealth appellants portray the Third Circuit panel as having departed from the accepted and usual course of judicial proceedings by going out of its way to resolve on the merits all of the issues raised in the appeal from the district court's ruling. A full reading of the court of appeals' opinion, however, establishes that

6. In the only reported state or federal appellate decision involving a statute regulating abortion since *Akron, Ashcroft* and *Simopoulos,* the court enjoined as unconstitutional the parental notification section of an Indiana statute. *Indiana Planned Parenthood Affiliates Ass'n v. Pearson,* 716 F.2d 1127 (7th Cir. 1983).

the court made careful and reasoned determinations on each issue raised by the parties. In several instances, the court of appeals was able to conclude that sections of the Act, on their face, were plainly unconstitutional under this Court's rulings in *Akron*, *Ashcroft* and *Simopoulos*, which were not available to the district court or the parties at the time of the initial ruling, and that no factual record that might be developed on remand could alter this result. In the interest of judicial economy, the court of appeals took the logical step of applying those dispositive decisions to declare these sections unconstitutional as a matter of law, even though the case initially came to that court on appeal from a ruling on a preliminary injunction.

The Third Circuit's action falls well within the bounds of accepted and usual appellate procedure. As a general matter, the standard of appellate review from a ruling on a preliminary injunction is whether the district court abused its discretion. *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). It is incumbent upon a court of appeals to reverse the district court's ruling "if the district court has proceeded on the basis of an erroneous view of the applicable law." *Donovan v. Bierwirth*, 680 F.2d 263, 269 (2d Cir.) (Friendly, J.), *cert. denied*, 459 U.S. 1069 (1982). *Accord, Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1242 (3d Cir. 1983), *cert. dismissed*, 104 S.Ct. 690 (1984); *Kennecott Corp. v. Smith*, 637 F.2d 181, 187 (3d Cir. 1980); *see Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938).

The similarity between the statutory provisions held unconstitutional in *Akron*, *Ashcroft* or *Simopoulos* and those at issue in this case was so great in several instances that no question as to the constitutionality of these provi-

sions remained. Thus, by the time the Third Circuit rendered its decision, it was apparent that the district court's view of the applicable law was erroneous, and a decision on the merits with respect to these issues was fully warranted.

As Professors Wright and Miller state:

> Review [on an appeal from a decision on a preliminary injunction] quite properly extends to all matters inextricably bound up with the remedial decision. In addition, the scope of review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any off-setting advantage in economy of appellate effort or uninterrupted trial court proceedings.

16 *C.A. Wright, A.R. Miller, E.H. Casper, Federal Practice and Procedure* § 3921 at p. 17 (1977). Recognizing this interest in judicial economy and the prompt dispensation of justice, courts of appeals have frequently reached the ultimate merits on appeal from an order granting or denying preliminary relief. *E.g., E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974); *Ballas v. Symm*, 494 F.2d 1167, 1170-71 (5th Cir. 1974); *Hedberg v. State Farm Mutual Automobile Insurance Co.*, 350 F.2d 924, 933 (8th Cir. 1965) (Blackman, J.). In those instances where the Third Circuit resolved appellees' constitutional challenges as a matter of law, it did so only where the result was compelled by this Court's decisions, in the interest of

judicial economy and to give the district court appropriate guidance in further proceedings.[7]

There is no special or important reason for this Court to exercise its certiorari jurisdiction in this matter. Accordingly, considering the papers filed by the Commonwealth appellants as a petition for writ of certiorari, that petition should be denied.

III. If The Appeal In This Matter Is Not Dismissed, Then This Court Should Summarily Affirm The Decision Of the Third Circuit Because No Further Argument Is Required.

In the event this Court does not dismiss the appeal, then it should summarily affirm the decision below. The court of appeals has applied the standards for determining the constitutionality of state statutes which regulate abortions announced by this Court in *Akron, Ashcroft* and *Simopoulos* and earlier decisions, and reached a result consistent with these standards. This appeal thus presents questions which are so insubstantial that further argument is not required.

(1) Section 3206 of the Act requires that, except in cases of medical emergency, an unemancipated minor woman seeking an abortion must either obtain the consent

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7. With respect to issues where the merits were not reached, the court of appeals offered an explanation for its decision, including, in some cases, the specific reasons why appellees failed to sustain their burden to establish a record sufficient to warrant the granting of preliminary relief. The Commonwealth appellants' characterization of this appropriate direction to the district court as "uncalled for hints" to appellees should be rejected out-of-hand. In any event, this certainly offers no basis for the granting of a writ of certiorari.

of her parent or guardian or petition the court for a determination that she is sufficiently mature to make her own decision or that an abortion is in her best interest. Following this Court's teaching in *Ashcroft,* in which the parental/judicial consent provision in a Missouri statute was held constitutional on its face, the court of appeals concluded that Section 3206 withstood a facial challenge to its constitutionality. (App. 50a-56a). The court recognized, however, that the provisions of Section 3206 are not nearly as explicit as those in the Missouri statute, particularly with respect to insuring that the courts consider petitions expeditiously and confidentially. Nevertheless, the court of appeals concluded that any resulting constitutional infirmities were cured by Section 3206(h), providing:

> The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition.

Despite this express direction in the staute, the record before the court of appeals revealed that the Pennsylvania Supreme Court has not promulgated such rules.[8] The panel

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8. Nor had the Pennsylvania Supreme Court expressly determined that such rules were unnecessary. To the contrary, the record revealed that Pennsylvania's Chief Justice issued a letter stating that the Orphans Court Rules Committee of the Pennsylvania courts had been directed to review the matter to determine the extent to which general rules are necessary and to prepare and propose such rules. In the interim, the lower courts were directed to treat proceedings under the Act "in a manner appropriately analogous to the procedures for maintaining confidentiality at hearings and for impounding proceedings under the Adoption Act." The court of appeals held that this interim direction to employ rules speaking only to confidentiality did not satisfy the mandate of § 3206(h) or cure the constitutional infirmities which would otherwise result.

unanimously held that Section 3206 could not be enforced until rules were in place sufficient to insure the confidentiality and expedition needed to render a parental/judicial consent provision constitutional. *See Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (plurality opinion).[9]

Thus, the impediment to enforcement of Section 3206 is not the decision of the court of appeals, but the Pennsylvania Supreme Court's failure to promulgate rules as expressly directed by the statute. The court of appeals cannot be faulted for requiring that the Pennsylvania judiciary take those steps necessary to insure that Section 3206, as applied, comports fully with federal constitutional standards.[10]

(2) Section 3210(b) of the Act compels a physician performing an abortion after the fetus is determined to be viable to choose the medical procedure which would pro-

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9. In the jurisdictional statement, the Commonwealth appellants raise for the first time the existence of a rule of judicial administration effective April 1, 1983 (more than one year prior to the Third Circuit's decision) which they contend satisfies the mandate of § 3206(h). This rule does no more than the earlier letter to the judges of the lower courts, insofar as it directs courts to apply the confidentiality provisions of the rules relating to adoption procedures. In any event, any argument that this rule is sufficient to cure constitutional infirmities in § 3206 must be addressed in the first instance to the courts below.

10. The court's direction to enjoin enforcement of § 3206 until rules are promulgated does not run afoul of the principle that federal courts should assume state courts will adopt procedures necessary to render judicial consent statutes constitutional. *See, e.g., Ashcroft*, 103 S.Ct. at 2525 n.16. This ruling makes no presumption as to whether final rules promulgated by the Pennsylvania Supreme Court will satisfy constitutional standards; rather, it recognizes that the interim steps taken by the Pennsylvania courts are not sufficient in this respect.

vide the best opportunity for the fetus to be born alive unless that procedure would present a "significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique. . . ."[11] A physician who fails to comply with this requirement commits a felony of the third degree, which carries a maximum penalty of seven years imprisonment and a fine of $15,000. 18 Pa. Cons. Stat. Ann. §§ 1101(2), 1103(3) (Purdon 1983). In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court assessed the constitutionality of a provision in the earlier Pennsylvania Abortion Control Act of 1974, similar to the one at issue here, that controlled the physician's choice of technique in post-viability abortions. The constitutional standard against which such provisions are to be measured was set forth in *Colautti* as follows:

> The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict.
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> • • •
>
> Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "tradeoff" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties

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11. Section 3210(a) prohibits abortions after the fetus is viable unless necessary to preserve the life or health of the pregnant woman. Consequently, the proscription of § 3210(b) with respect to the choice of method or technique will come into play only in situations where the physician has already determined that his patient's life or health is threatened absent the abortion.

> of this magnitude are involved, the state, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

Id. at 400-01.

The Commonwealth appellants do not dispute that the court of appeals properly relied upon *Colautti* in considering the constitutionality of Section 3210(b). Nor could they seriously contend that the term "significantly greater," if given its usual and customary meaning, would permit the physician in all instances to choose that method of abortion which best serves the medical interest of the pregnant woman. Rather, the Commonwealth appellants contend that the court should have eliminated any ambiguity in Section 3210(b) by striking the word "significantly" from the section.

The court of appeals unanimously declined this invitation to rewrite the Act, as did this Court in Colautti. (App. 68a-71a). In contrast to those constitutional challenges which could be cured by a limiting construction, the court properly recognized that it could not rewrite the criminal provisions of Section 3210(b) in a manner that simply ignores the express formulation chosen by the Pennsylvania legislature. Because the constitutional challenge to this particular section presented a matter of pure statutory construction, there was no reason for the court of appeals to await further evidentiary proceedings in the district court before expressing its opinion that the section is unconstitutional as a matter of law.

(3) Section 3210(c) of the Act requires the attendance of a second physician for abortions performed after the fetus has become viable. In *Ashcroft,* six justices of this Court concluded that a similar second doctor requirement in the Missouri statute could not withstand constitutional scrutiny if the statute failed to provide an exception for medical emergencies in which securing the presence of a second physician may endanger the woman's health. 103 S. Ct. at 2522, n.8, 2530-31. Again, the Commonwealth appellants do not question the court of appeals' conclusion that, in light of *Ashcroft,* a medical emergency exception to Section 3210(c) is constitutionally mandated. Rather, they contend that the court erred when it failed to find such an exception in the language in Subsection 3210(a) which provides:

> It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgement, . . . that the abortion was necessary to preserve maternal life or health.

The court of appeals correctly concluded that this language only protects the physician against a charge that the post-viability abortion was unlawful in the first instance, and it does not provide a medical emergency exception to the second doctor requirement, found in a separate subsection. (App. 71a-75a).

More importantly, reading this language to provide a medical emergency exception cannot be squared with the remaining provisions of the Act. In Section 3203, the term "medical emergency" is defined as follows:

> That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

In five sections of the Act, express exceptions for a medical emergency, as narrowly defined, are provided.[12] In sharp contrast, no express medical emergency exception is found in Section 3210(c). Obviously, the Pennsylvania General Assembly knew how to provide for a medical emergency exception when it intended to do so. Therefore, the court of appeals concluded that this section could not be found constitutional under *Ashcroft*. As with the "significantly greater" language in Section 3210(b), the question of the presence or absence of an exception for medical emergencies presented an issue of statutory construction which required no evidentiary record. Having found that the requisite exception was not present, the court of appeals properly held Section 3210(c) unconstitutional as a matter of law.

(4) In order for the consent of a woman seeking an abortion to be deemed "informed," Section 3205 of the Act mandates that certain pieces of information be provided to all women, irrespective of their individual circumstances, that some of this information be provided to the woman solely by a physician, and that the physician wait 24 hours between the time the woman receives the information and the time the abortion is performed. In light of this Court's clear holding in *Akron*, the Commonwealth appellants conceded before the court of appeals that the doctor-only counseling requirement and the 24-hour waiting period requirement are unconstitutional. The court also properly recognized that, under the reasoning of *Akron*, the specific informational requirements must fall. (App. 43a-50a).

12. The requirement of a private medical consultation prior to the abortion (§ 3204), the informed consent requirements (§ 3205), the parental/judicial consent requirements (§ 3206), the requirement that post-first trimester abortions be performed in a hospital (§ 3209) and the requirement that no public official issue any order requiring an abortion without the express voluntary consent of the woman (§ 3215(f)) all contain express exceptions for medical emergencies.

The Commonwealth appellants argue that the court of appeals should have considered each of the eight informational requirements independently and, applying the severability clause of the statute, declare only the objectionable requirements to be unconstitutional.[13] This argument, however, simply ignores one of this Court's bases for declaring the informational requirements in the *Akron* ordinance unconstitutional:

> An additional, and equally decisive, objection to Section 1870.06(B) is its intrusion upon the discretion of the pregnant woman's physician. This provision specifies a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision. . . . Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion. But Akron has gone far beyond merely describing the general subject matter relevant to informed consent. By insisting upon recitation of a lengthly and inflexible list of informatinon, Akron unreasonably

13. This argument is based upon a comment in *Akron* that some of the information requested by the Akron ordinance was "not objectionable, and probably is routinely made available to the patient." 103 S.Ct. at 2501, n.37. This Court expressly declined, however, to sever arguably unobjectionable information requirements because of the other unconstitutional components of the informed consent provision. Here, the court of appeals similarly declined to sever provisions of § 3205, given that that section also contained the patently unconstitutional 24-hour waiting period and doctor-only counseling requirements.

> has placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33, 97 S.Ct. 869, 879 n.33, 51 L.Ed.2d 64 (1977).

103 S.Ct. at 2500-01. Like the Akron ordinance, Section 3205 of the Act specifies a litany of information that must be provided to all women in all cases, including information about the availability of public assistance benefits and financial support from the father of the child. Plainly, this information is not relevant to each woman's personal decision whether or not to have an abortion, and it is far removed from the physical and emotional implications of that decision. Measuring the detailed informed consent requirements of Section 3205 against this Court's holding in *Akron*, the court of appeals correctly concluded that these provisions could not constitutionally be enforced as a matter of law.

(5) Section 3214 of the Act imposes extraordinary reporting requirements for each abortion performed, whatever the stage of pregnancy. As accurately described by the court of appeals:

> The physician must sign a report to be filed the following month, which includes 14 categories of data, including but not limited to identification of the physician, facility, and referring physician, agency or service; the political subdivision and state in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period and probable gestational age of the unborn child; the type of procedure performed; complications; the "length and weight of the aborted unborn child when measurable"; the "[b]asis for any medical judgment that a medical emergency existed," the viability report referred to in Section 3211(a), and

> the method of payment for the abortion. Another detailed report must be filed by the physician as to each woman who has "complications" from an abortion or attempted abortion. (App. 77a-78a).

The constitutional limits which must be met by statutory provisions of this type was last considered by this Court in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). At issue in *Danforth* was a requirement of Missouri law that a physician maintain records of abortions performed and make those records available to public health officials. The Court concluded that, "Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* at 80. The Court also concluded that the relatively non-intrusive recordkeeping requirements in *Danforth* "approach[ed] impermissible limits," and the Court cautioned that such provisions must not be "utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." *Id.* at 81.

Confronted here with a statute which required that highly detailed reports be filed with public officials, a record which established that the making of these reports would increase the cost of abortions and the failure of the Commonwealth to offer a compelling state interest to justify the reporting requirements, the court of appeals held that Section 3214(a), (b), (e) and (h) crossed the threshold of unconstitutionality described in *Danforth*. (App. 77a-82a). Thus, the court of appeals necessarily reversed the district court's refusal to enter a preliminary injunction as to these provisions.

A preliminary injunction against the enforcement of the reporting requirements is plainly warranted on the record before the Third Circuit. If enforcement of these provisions is permanently enjoined at the conclusion of the proceedings before the district court, the merits of that decision can be considered on the basis of a complete record by the appellate courts, including this Court, should the matter return to it. Therefore, if the merits of the appeal are considered at this time, the interlocutory decision of the court of appeals should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the appeal for want of finality, consider the appeal papers as a petition for writ of certiorari and deny that petition. Alternatively, if the Court does not dismiss the appeal, then the decision of the United States Court of Appeals for the Third Circuit from which the appeal is taken should be summarily affirmed.

Respectfully submitted,

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NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees

On Appeal from the United States
Court of Appeals for the Third Circuit

APPELLANTS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 84-495

RICHARD THORNBURGH, et al.,

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V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

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APPELLANTS' REPLY BRIEF

ARGUMENT

1. Appellees argue (Br. 7-10), relying on South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam) and Slaker v. O'Connor, 278 U.S. 188 (1929), that the Court lacks

jurisdiction over this appeal under 28 U.S.C. § 1254(2) because there is no final judgment. The Court more recently had occasion to observe that

> [t]here may be some question as to the continuing vitality of the "finality" requirement in the context of [28 U.S.C.] §1254(2), which unlike such jurisdictional statutes as 28 U.S.C. §§1257 and 1291 has no "finality" provision in the statute itself.

New Orleans v. Dukes, 427 U.S. 297, 301-302 (1976) (per curiam). On other occasions, the Court has adverted to the question without resolving it. See Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975); Chicago v. Atchison T & S.F.R. Co., 357 U.S. 77, 82-83 (1958).

Appellants respectfully submit that Slaker v. O'Connor, supra and South Carolina Electric and Gas Co. v. Flemming, supra, mistakenly read into 28 U.S.C. §1254(2) a requirement of finality. Only in Slaker did the Court

discuss the finality issue. But the issue was not before the Court; as the Court observed: "The petition contained three counts none of which questioned the validity of the statute." 278 U.S., at 189. The attempt to appeal under the predecessor of Section 1254(2) was, as the Court held, patently frivolous. Moreover, in neither Slaker nor Flemming did the Court have the benefit of briefs and arguments of counsel on the finality question.

Section 240(b) of the Judiciary Act of 1925, the predecessor of §1254(2) made no mention of a requirement of finality. 43 Stat. 936, 939. This provision was inserted into the bill which became the Judiciary Act during the Senate debate as a parallel to the section permitting an appeal from state court judgments holding unconstitutional federal statutes or treaties. See

Frankfurter and Landis, The Business of the Supreme Court, 276-278 (1927). That later provision contained specific language requiring a final judgment. 43 Stat. 936, 937. Congress plainly was aware of the final judgment requirement and, it must be assumed, purposely omitted it from §240(b). In the 1948 recodification of the Judicial Code the final judgment qualification was retained for appeals from state courts, 28 U.S.C. §1257, but no such requirement was attached to appeals under §1254(2).

Good reasons support the Congressional decision not to impose a requirement of finality in appeals from circuit court decisions holding state statutes unconstitutional. The concept of federalism, which embodies the subsidiary principle of federal court respect for state sovereignty, supports the view that Supreme Court intervention

should be required at the earliest stage consistent with sound, efficient judicial administration. Every day in which a state statute is enjoined from enforcement by federal court order, perhaps erroneously, weakens the state-federal balance of responsibility.

The need for a right to appeal can be exemplified no better then by this case. Here a court of appeals has taken the patently erroneous course of declaring numerous provisions of state law unconstitutional despite the fact that no trial has been held, the defendants have yet to offer evidence to support the statutes and the proceedings which were held in the district court were abbreviated and expedited. See Jurisdictional Statement, pp. 6-7. It is plain that, in providing an appeal to this Court as a matter right in cases in which a court of appeals has held a

state statute unconstitutional, Congress intended to facilitate this Court's review. A requirement of finality directly contradicts this overriding purpose of the statute and this is precisely why, by its terms, §1254(2) contains no requirement of finality.

If no appeal lies at this time, the court of appeals will have effectively limited the State's ability to obtain review by this Court of an injunction which may be in force for years before it will be ripe for appellate review. To be sure, certiorari is available, as appellees concede, but as we have discussed, Congressional preference for an appeal as of right has strong support in the concept of federalism. This illustrates quite clearly the basis for Congress' choice not to impose a finality requirement for appellate jurisdiction under §1254(2).

The only countervailing policy supporting a finality qualification for §1254(2) appeals is the necessity of conserving this Court's resources by avoiding piecemeal litigation. That policy would not be undercut by appellate review in cases such as this one. The court of appeals unequivocally has ruled that the statutory provisions at issue here are unconstitutional. There is no realistic possibility that further factual development will alter that court's views. Of greater importance is the substantial risk that defendants will be precluded from offering evidence at trial in support of the constitutionality of the provisions struck down by the court of appeals. Eventual reversal by this Court with directions that a new trial be held disserves the interest in judicial economy.

For these reasons, §1254(2) should be interpreted to permit an appeal in this case.

2. Even if the Court concludes that it lacks jurisdiction over this appeal, certiorari should be granted and the Third Circuit's decision should be reversed. As we detailed at length in our jurisdictional statement (pp. 10-14), the Court of Appeals seriously "departed from the accepted and usual course of judicial proceedings . . . ." Sup. Ct. R. 17.1(a). In fact, appellees make no serious attempt to distinguish this case from Mayo v. Lakland Highlands Canning Co., 309 U.S. 310 (1940), in which the Court held as clearly as it could that statutes should not be held unconstitutional when the sole question before the court is whether a preliminary injunction should be granted.

Appellees argue (Motion to Dismiss or Affirm, p. 12) that the course followed by the Court of Appeals was appropriate because no factual record could be developed to support the striken provisions and they are "unconstitutional as a matter of law." Suffice it to say that Mayo holds that no court is warranted in making this assumption. In fact, only if the parties expressly agree may a preliminary injunction proceeding be regarded as a proceeding on the merits. Fed. R.Civ. P. 65(a)(2). This Court recently noted that an order consolidating a trial on the merits with a preliminary injunction hearing should be preceded by

> "clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present for their respective cases."

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (alteration in original; citations omitted). Of course, no such notice was provided here since the district and the parties all clearly understood that no ruling on the merits would be issued. App. 176c, n.1; 274a-278a.

The Court of Appeals' departure from accepted judicial procedure warrants this Court's review. Moreover, for the reasons outlined at length in our jurisdictional statement, the Third Circuit clearly failed to properly apply this Court's precedents to the particular statutory provisions at issue here; this presents additional grounds warranting this Court's immediate review.

CONCLUSION

Probably jurisdiction should be noted. In the alternative, certiora should be granted.

Respectfully submitted,

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NO. 84-495

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

RICHARD THORNBURGH

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His interest is to defend the constitutional right to life of children unborn and born alive. The parties have not done this.

This is effectively a motion to allow retained counsel to represent the victims being killed, since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

Roe v. Wade is void, because the Court decreed deliberate killings to be "liberty"

which had been democratically defined to be "murder" since long before the adoption of the Fourteenth Amendment.

The decree that "MASS MURDER IS LIBERTY" is the ultimate lawless act.

Since Roe v. Wade is void, this disposes of all the issues raised by the parties.

The victims being killed are entitled by the U.S. Constitution to be especially represented by counsel (no cost to taxpayers) to defend their right to life under the U.S. Constitution.

When judges decree that "MASS MURDER IS LIBERTY," and then maintain the killings by refusing to allow counsel to represent the victims, then it cannot be pretended that it is any longer the government of the United States, or any government of Constitution and laws.

The amicus curiae brief of the Legal Defense Fund For Unborn Children is incorporated herein by reference.

ARGUMENT

I.
ROE v. WADE IS VOID, BECAUSE THE SUPREME COURT HITLER-LIKE DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER." THE DECREE THAT "MASS MURDER IS LIBERTY" IS THE ULTIMATE LAWLESS JUDICIAL ACT.

In Roe v. Wade, the Supreme Court decreed killings to be "liberty" which had been democratically defined to be "murder" since long before adoption of the Fourteenth Amendment.1

1./ When the Fourteenth Amendment was adopted, an abortion was murder if the child was "born alive." And a child could be "born alive" long before viability.

A. The English Common Law

The English common law, as stated in the works of Coke, (3 Inst. 50), Hawkins, (1 Hawkins Ch. 13, s. 16) and Blackstone, (4 Bl. Com. 198) defined an abortion, in which a "quick" child died after being "born alive," to be "murder."

Thus, under the common law, an abortion of an unviable child, a child too immature to survive outside the womb, who died after being born alive, was "so horrible an offense" and "this is murder." 3 Inst. 50.

Regina v. West, 2 C & K 784 (1848) followed Coke, Hawkins, and Blackstone, and ruled that an abortion was murder if the child

In 1857, the American Medical Association began a two year study of all the abortion laws in the United States. The 1859 report stated the law of murder throughout the United States, as follows:

> "If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder." Reported in A.S. Taylor, infra page 7. (emphasis added)

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was born alive, even though the child died because it was too immature to survive outside the womb.

The indictment for murder alleged that the defendant had inserted a "certain pin ... upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Regina v. West, 2 C & K at 784-85. The child died shortly afterward. A "medical witness" had testified:

"[I]t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any

Yet, in 1973, this is the very killing which the U.S. Supreme Court decreed to be "liberty."

In the plainest terms, the U.S. Supreme Court decreed: "MASS MURDER IS LIBERTY."

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considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K at 785.

The judge, relying on Coke and Blackstone, instructed the jury that if the child were "born alive," the abortion was murder, even though the child were not viable:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes the child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Regina v. West, 2 C & K at 788.

The case of Regina v. West, supra, was

Many people would be astonished to learn that this case for the unborn is the very case they would have to present for themselves if their own right to life were challenged in a federal court.

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cited by the leading English writers as the correct statement of the law of murder. See, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). An abortion which resulted in an unviable child being born alive was murder.

B. THE AMERICAN LAW OF MURDER IN 1868

The common law is the dictionary for the state and federal homicide statutes; American courts used it to construe the meaning of their murder statutes. Hamilton v. United States, 26 App. D.C. 382 (1905); Clarke v. State, 117 Ala. 1 (1898).

By the time the Fourteenth Amendment was adopted in 1868, the leading American legal authorities had specifically cited Regina v. West, supra, as the correct statement of the law of murder.

As Wharton explained the law, A Treatise on

For example, take almost any group of persons, such as the insane, or invalids, or Jews. Suppose it were claimed in federal court that it is "liberty" to deliberately kill members of these groups, as well as the unborn.

What factual, non-argumentative evidence

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the Law of Homicide in the United States 93 (1855):

"If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

American authorities agreed that this was the correct statement of the law of murder. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, Manual of Medical Jurisprudence 462, 517 (Penrose Am. ed. 6th ed. 1866). This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.

C. THE LAW OF MURDER AND THE MEANING OF THE FOURTEENTH AMENDMENT

If the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant from its mother's

could be found to establish their right to life under the U.S. Constitution?

As the case for the unborn shows, it would do no good to object that no one ever heard of a "liberty" to deliberately kill the insane, or invalids, or Jews - or to object that such killings had thereto been defined as criminal.

---

womb and leaving it to die, as murder, then it is certain that they did not intend to exclude the lives of these children from the protection of the Fourteenth Amendment so they could be deliberately killed with impunity from criminal statutes.

If the people who framed and adopted the Amendment had condemned the deliberate killing of Jews to be murder, it is certain that they did not intend to exclude Jews from the protection of the Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes. Changing the names of the victims does not change the legal result.

But by seizing upon viability, the Supreme Court decreed the same killing to be "liberty" which the American people had universally defined to be "murder." It is a naked decree without any investigation whatever into the law of murder. In its ignorance, the Court decreed: "Mass Murder is Liberty."

Since the universal words "any person" in

And the Fifth and Fourteenth Amendments merely state that they protect the life of "any person." So, as with the unborn, the Amendments do not expressly refer to the insane, or invalids, or Jews; and their legislative histories do not appear to specifically refer to the insane, or invalids, or Jews.

---

the Fourteenth Amendment must include all persons whose lives were protected by the law of murder when the Amendment was adopted, the lives of these children were specifically guaranteed by the Amendment. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, then the lives of these children are still protected by the Fourteenth Amendment. Roe v. Wade is void.

D. THE HYSTEROTOMY ABORTION UNDER ROE v. WADE

A common way to perform abortions under Roe v. Wade is by hysterotomy. Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass. 1976). A hysterotomy is essentially a caesarean, in which a live but unviable child is taken from the womb and left to die. HEARINGS ON THE PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; and their legislative histories, to the extent they have any, do not appear to specifically refer to these groups.

The principle in the Declaration of

94th Cong., 2d Sess., Ser. 46, Part 1, at 391 (1976).

As established by medical testimony at these 1976 House abortion hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive." Id., at 397.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder.

E. ROE v. WADE AND MISTAKE OF LAW

The constitutional provisions against ex post facto laws do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). And mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft #4, Comments Sec. 2.04, at 138.

Since Roe v. Wade is a mistake of law, mass murder is being perpetrated in the United

Independence, that all people are "created" equal, and endowed with an unalienable right to life, having been sneered out of court in Roe v. Wade, now provides no assurance for anyone. The Court so perverted the Declaration of Independence as to amount to just this: "All men are created equal, except those created to be murdered for the convenience of others."

States under guise of law. The Roe v. Wade hysterotomy killings, by definition under the law of murder when the Fourteenth Amendment was adopted, and thus also constitutional law, violate the murder statutes throughout the United States.

The Supreme Court decreed mass murder to be liberty without any examination of the law of murder; it was a naked decree. And as Abraham Lincoln warned, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him. 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. 3 Wharton's Criminal Law and Procedure 673 (12th ed. 1957).

And year after year the U.S. Supreme Court has deliberately adhered to its decree that

So, what factual, non-argumentative evidence is there for the insane, or invalids, or Jews to protect themselves from a judicial decree that it is "liberty" to deliberately kill them with impunity from criminal statutes?

"Mass Murder is Liberty" in the very teeth of challenges that these children were being murdered in violation of the Constitution and laws of the United States, and of the States. See amicus curiae brief of The Legal Defense Fund for Unborn Children, filed in Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1983).

This is deliberation and premeditation unparalleled in the legal history of the world. The Justices responsible for these killing may be facing the death penalty in very many states.

It may be that the judges responsible for these murders did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote: "Ignorance of the law is no excuse for breaking it....It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (Little Brown paperback 1963).

Roe v. Wade is not going to protect one

The case for the unborn is the case for many others; it is this same body of factual evidence which many people must ultimately rely upon to establish that their right to life is protected by the U.S. Constitution.

If the people who framed and adopted the Fourteenth Amendment had condemned the deliberate killing of Jews to be "murder," then it is certain that they did not intend to exclude the lives of Jews from the

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single judge from the law of murder, because it is a mistake of law. Mass murder is not liberty. These children were murdered in violation of the Constitution and positive criminal statutes.

F. CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

Since the U.S. Constitution is "the supreme law of the land," and the evidence proves that the lives of these children are protected by the U.S. Constitution, Roe v. Wade is void.

protection of the U.S. Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes.

And merely changing the names of the victims would not change this conclusion.

Since the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant, whether viable or not, from its mother's womb and leaving it to die to be "murder," it is certain that the framers did not intend the Amendment to create a "liberty" to deliberately kill these children with impunity from criminal statutes. It is certain that the lives of these children are protected by the U.S. Constitution.

And since the right to life protected by the Constitution does not just disappear with time, as whitewash weathers off an aging fence, it is certain that the lives of these children are still protected by

the U.S. Constitution. And since the Constitution is the "supreme law of the land," it is certain that Roe v. Wade is void; it is not law.

The thousands of "born alive" abortions since 1973 can be prosecuted as murder.

If the Court had decreed it "liberty" to deliberately kill Jews, it would rightly be denounced as murder. Judges may have more sympathy for other victims, but changing the names of the victims from "Jew" to "unborn" will not change the legal result.

In his novel "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, yet, the U.S. Supreme Court has defrauded the American people into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

When judges decree that "MASS MURDER IS LIBERTY," then it can not be pretended that

it is any longer the government of the United States - or any government of constitution and laws.

Abraham Lincoln ridiculed the Dred Scott decision by reducing it to its plainest terms: "If any one man, choose to enslave another, no third man shall be permitted to object."2 In Roe v. Wade, the Court invented an even more astonishing falsehood, "If any one man, choose to murder another, no third man shall be permitted to object."

The U.S. Supreme Court has Hitler-like asserted to legalize mass murder. By

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2./ 2 Collected Works of Abraham Lincoln 462 (Basler ed. 1953). In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 451 (1857), the U.S. Supreme Court held that the word "person," as used in the Constitution, did not include Negroes. While the Court did not assert a "liberty" to deliberately kill Negroes, the Court did rule that "the right to property in a slave is distinctly and expressly affirmed in the Constitution," and Congress could not prohibit slavery in the federal territories.

changing the names of the victims, the Court has duplicated the conduct of "the supreme judge" of Nazi Germany.[3]

The evidence shows that the U.S. Supreme Court is committing mass murder under the guise of law; the dagger of the assassin has been concealed beneath the robe of the jurist. Roe v. Wade is void.

3./ The Nuremberg court described how Hitler was "the supreme judge" of Nazi Germany. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011 (1951). This "supreme judge" decreed deliberate killings to be legal which had been defined as criminal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted within the authority of the decrees of "the supreme judge." United States v. Altstoetter, supra, 983-85. But the Nuremberg Court held, "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, 985.

By changing the name of the victims from "Jew" to "unborn," the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. But changing the name of the victims will not change the legal result. Roe v. Wade is murder.

II.
THE VICTIMS BEING KILLED BY ROE v. WADE ARE CONSTITUTIONALLY ENTITLED TO BE ESPECIALLY REPRESENTED BY COUNSEL TO DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

The victims being killed by Roe v. Wade have a constitutional right to be especially represented by a next friend, or counsel, at no cost to taxpayers, to defend their right to life under the U.S. Constitution.[1]

If the constitution would not permit a court to condemn one single Jew to death in a criminal trial, but deny assistance of

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1./ Goldberg v. Kelly, 397 U.S. 254, 268-270 (1970); In Re Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

The U.S. Constitution will not permit any judge to exclude anyone from the protection of the U.S. Constitution, so the victim can be deliberately killed with impunity from criminal statutes, without assistance of counsel to defend the victim's right to life under the U.S. Constitution.

When judges decree that "MASS MURDER IS LIBERTY," and then maintain the killings by refusing to allow the victims being killed to be assisted by counsel to defend their right to life under the U.S. Constitution, then it cannot be pretended that it is any longer the government of the United States, or any government of Constitution and laws.

counsel, then neither will the Constitution permit a court to condemn all Jews in the United States to death, without counsel, by calling it a civil proceeding, and decreeing that the lives of Jews are not protected by the U.S. Constitution, and it is "liberty" to deliberately kill any or all Jews in the United States with impunity from criminal statutes.

If the Roe v. Wade process were used to decree a "liberty" to kill Jews, it would rightly be condemned as murder. By merely changing the names of the victims, this is now going on in the courts of the United States. But changing the names of the victims will not change the legal result.

The unborn have never been represented by counsel in the entire Roe v. Wade process. The unborn have a right under the U.S. Constitution to be especially represented by counsel to defend their right to life under the U.S. Constitution.

III.

THE U.S. SUPREME COURT HAS DECREED "MASS MURDER IS LIBERTY," AND IT HAS MAINTAINED THE KILLINGS, YEAR AFTER YEAR, BY REFUSING TO ALLOW COUNSEL TO REPRESENT THE VICTIMS BEING KILLED. THE HUMAN MIND CANNOT IMAGINE A MORE CORRUPT JUDICIAL PROCESS.

When judges willfully deprive the unborn of the right of assistance of counsel to defend their right to life under the U.S. Constitution, it is not only unconstitutional, it is criminal.[1]

The human mind could not imagine a more corrupt judicial process:

(1) judges decree that "Mass Murder is Liberty," and

(2) the judges effect the killings by refusing to allow counsel to represent the victims to be killed; and

(3) the judges maintain the killings year after year, in the teeth of challenge, by repeatedly refusing to allow counsel

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1./ "Even judges ... could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242." Imbler v. Pachtman, 424 U.S. 409 (1976).

to represent the victims being killed to defend their right to life under the U.S. Constitution.

If this process were used to decree it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. Judges might have more sympathy for another category of victims, but changing the name of the victims from "Jew" to "unborn" will not change the legal result.

Now a lawyer must try to prove that the most corrupt judicial process, which the human mind can imagine, is wrong.

But the lawyer cannot even be heard, because the Court will not allow counsel to represent the victims being killed and defend their right to life under the U.S. Constitution.

The U.S. Supreme Court is willfully maintaining these killings by refusing to allow truth to work in its Court. This is unconstitutional and criminal.



A 1

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The photograph, supra A-1, shows a second stage abortion by prostaglandin. Such abortions not uncommonly result in the child being born alive.[1] This Court would be guilty of murder for such killing. There have been thousands of such killings under Roe v. Wade; and witnesses live to tell.

If the child were born dead, the Court would be guilty of criminal extermination.[2]

As the Court studies the face of this victim of Roe v. Wade, let it contemplate that a government of laws shall be restored, and call the killers to account.

1./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977). There are about 140,000 second stage abortions each year. All the common second stage abortion techniques - hysterotomy, prostaglandin, and even salt poisoning - can result in the child being born alive. Jefferies and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

2./ Since the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn, their lives are also protected from judicial extermination by 18 U.S.C. (242.

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH, et al.,

Appellants

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees

On Appeal From The United States
Court of Appeals For The Third Circuit

JOINT APPENDIX

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APPEAL DOCKETED SEPTEMBER 26, 1984.
JURISDICTION POSTPONED APRIL 15, 1985.

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*"J.S. App." refers to the appendix to the Jurisdictional Statement filed in this case.

RELEVANT DISTRICT COURT DOCKET ENTRIES

Date		Proceedings - Docket No. 82-4336
1982		
Oct.	4	Complaint filed.
	29	Plaintiffs' Motion for Preliminary Injunction, Certificate of Service, filed.
	29	Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, filed.
	29	Plaintiffs' Exhibits in support of Motion for Preliminary Injunction, filed (2 volumes).
Nov.	18	Order that a preliminary injunction hearing shall be held on December 2, 1982, etc. A procedural conference shall be held in chambers on December 1, 1982, etc. filed.
Dec.	1	Plaintiffs' Proposed Findings of Fact and Conclusions of Law for Determination of Motion for Preliminary Injunction, filed.

Dec.	1	Defendants' Proposed Findings of Fact and Conclusions of Law for Determination of Plaintiff's Motion for Preliminary Injunction, Certificate of Service, filed.
	1	Stipulation of Uncontested Fact for Determination of Motion for Preliminary Injunction, filed.
	2	Argued Sur: Hearing of December 2, 1982; re: Argument on Plaintiff's Motion for Preliminary Injunction, C.A.V., filed.
	7	ORDER THAT ENFORCEMENT OF THE 24 HOUR WAITING PERIOD IS ENJOINED. THE ACT SHOULD BE UNDERSTOOD TO READ AS IF THE WORDS "AT LEAST 24 HOURS BEFORE THE ABORTION" DO NOT APPEAR IN EITHER §3205(a)(1) or (a)(2), ETC. THE INVALIDITY OF ONE PART OF THE ACT DOES NOT AFFECT THE VALIDITY OF ANY OTHER PART OF THE ACT. ACCORDINGLY, IN ALL OTHER RESPECTS THE PLAINTIFFS' MOTION PRELIMINARILY TO ENJOIN THE OPERATION OF THE ENTIRE ACT IS DENIED, FILED. 12/7/82 Entered and Copies mailed.

Dec.	8	Plaintiffs' Motion for Injunction Pending Appeal, Certification of Notice to Adverse Parties and of Service, Filed.
	8	Plaintiffs' Notice of Appeal, Certificate of Service, filed (U.S.C.A. 82-1785). 12/8/82 Copies to: A. Gordon, Esquire, R.T. Williamson, Esquire, D. Spitz, Judge Huyett, III, Clerk U.S.C.A.
	8	ORDER THAT PLAINTIFFS' MOTION FOR INJUNCTIUN PENDING APPEAL IS DENIED, FILED. 12/8/82 Entered and copies mailed.
	10	Memorandum, Huyett, J., In Support of Order of December 7, 1982, Filed. 12/16/82 Entered and Copies mailed.
	13	Certified copy of Order from U.S.C.A. that the Motion for Injunction Pending Appeal is Granted until further Order of this Court., etc. filed.
	23	CERTIFIED COPY OF ORDER FROM U.S.C.A. ORDERED THAT PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL BE AND IS HEREBY GRANTED, AND IT IS FURTHER ORDERED THAT THE COMMONWEALTH'S

		MOTION TO VACATE THE STAY HEREINBEFORE GRANTED BY THIS COURT, BE AND THE SAME IS HEREBY DENIED, FURTHER ORDERED THAT THE PLAINTIFFS' MOTION FOR EXPEDITED APPEAL BE AND THE SAME IS HEREBY GRANTED, ETC. FILED.
1983		
Dec.	11	Defendants' Motion to Vacate Injunction Against Enforcement of Section 3206 (Parental Consent/Judicial Approval of the Pennsylvania Abortion Control Act, Brief, Certificate, Filed.
	21	Plaintiffs' Memorandum in Opposition to Defendants' Motion Vacate Injunction Against Enforcement of Section 3206 of the Pennsylvania Abortion Control Act, Certificate, filed.
1985		
Feb.	22	ORDER THAT DEFENDANTS' MOTION TO VACATE THE INJUNCTION AGAINST ENFORCEMENT OF SECTION 3206 OF THE PENNSYLVANIA ABORTION CONTROL ACT IS DENIED, FILED. 2/25/85 entered and copies mailed.

RELEVANT COURT OF APPEALS DOCKET ENTRIES

Date		Proceedings -- Docket Nos. 82-1785 and 82-1846
1982		
Dec.	8	Motion by Appellants for Expedited Appeal and for Injunction Pending Appeal, and Appendix in Support of Motion, with service, filed.
	9	ORDER (Hunter and Garth, C.J.) GRANTING MOTION FOR INJUNCTION PENDING APPEAL UNTIL FURTHER ORDER OF THIS COURT; FURTHER DIRECTING APPELLEES TO FILE A BRIEF IN RESPONSE TO APPELLANTS' MOTION BY 12/15/82, FILED.
	10	Motion by Appellees to Vacate this Court's Order of 12/9/82, granting Appellants Motion for Injunction Pending Appeal, with service, filed.
	10	Response by Appellees and Memorandum of Law in Opposition to Appellants' Motion for Injunction Pending Appeal, with service, filed.
	22	ORDER (Hunter, Garth and Sloviter, C.J.) GRANTING PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL; FURTHER DIRECTING THAT THE

		COMMONWEALTH'S MOTION TO VACATE THE STAY BE AND IS HEREBY DENIED; FURTHER DIRECTING THAT PLAINTIFFS' MOTION FOR EXPEDITED APPEAL BE AND THE SAME IS HEREBY GRANTED; FURTHER DIRECTING THAT THE CLERK SHALL ESTABLISH THE HEARING SCHEDULE FOR APPEAL; GRANTING MOTION BY LANE, et al., FOR LEAVE TO FILE BRIEF AMICI CURIAE, FILED.
1983		
Mar.	17	Clerk's letter to Thomas E. Zemaitis, Esquire (Appellant) and Andrew S. Gordon, Esquire written at the direction of the Court, advising counsel Court has concluded to mark a "hold" pending the decision of the United States Supreme Court in the pertinent cases which have been argued before it.
June	21	Clerk's letter to counsel, written at the direction of the Court, directing supplemental briefing concerning the effect on the present appeal of the United States Supreme Court's recent decision in City of Akron v. Akron Center for Reproductive Health, Inc., Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, and Simopoulos v. Virginia; Brief of Appellants, cross-appellees due on 7/6/83; brief of appel-

		lees, cross-appellants due on 7/29/83; briefs not to exceed 40 pages and the court will decide, after receipt whether further oral arqument is desired. (Covers 82-1785 and 82-1846).
1984		
May	31	Opinion of the Court remanding to the District Court for further Proceedings in accordance with its opinion.
	31	Judgment issued in lieu of a formal mandate.
June	28	ORDER (Aldisert, Ch.J., Seitz, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, and Becker, C.J.S) DENYING PETITION FOR REHEARING. CHIEF JUDGE ALDISERT AND JUDGE GIBBONS DISSENT FROM THE DENIAL OF THE PETITION FOR REHEARING TOGETHER WITH SEPARATE STATEMENTS BY JUDGE ADAMS AND JUDGE WEIS, FILED. (Covers 82-1785 and 1846).
Sept.	17	Notice of Appeal to the Supreme Court of the United States by Richard Thornburgh, H. Arnold Muller, Helen O'Bannon, Michael J. Brown, William R. Davis, LeRoy S. Zimmerman and Joseph A. Smyth, Jr., filed

		with service (Covers 82-1785 and 82-1846)
1985		
April	18	Copy of Order dated April 15, 1985 from the Supreme Court of the United States which reads as follows "THE STATEMENT OF JURISDICTION IN THIS CASE HAVING BEEN SUBMITTED AND CONSIDERED BY THIS COURT, FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION IS POSTPONED TO THE HEARING OF THE CASE ON THE MERITS, Filed. S.C. No. 84-495. (Covers 82-1785 and 1846).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,	:	CIVIL ACTION
Plaintiffs	:	
V.	:	NO. 82-4336
THORNBURGH, et al.,	:	
Defendants	:	

STIPULATION OF UNCONTESTED FACTS
FOR DETERMINATION OF MOTION FOR
PRELIMINARY INJUNCTION

Plaintiffs and Defendants, by their respective undersigned counsel, hereby stipulate and agree that, solely for purposes of a determination on plaintiffs' motion for preliminary injunction, the following facts are uncontested. This stipulation is made without prejudice to any party's right to controvert any facts or to prove any additional

facts at any later proceeding in this action.

1. Plaintiff Henry H. Fetterman is a physician licensed to practice medicine and surgery in Pennsylvania who specializes in the practice of obstetrics and gynecology. He received his Doctor of Medicine degree from the University of Pennsylvania in 1947. He served his internship and residency at Allentown Hospital in Allentown, Pennsylvania and was a resident in obstetrics and gynecology at the Hospital of the University of Pennsylvania in Philadelphia. He was certified by the American Board of Obstetrics and Gynecology in 1955. He has taught at the University of Pennsylvania Medical School and at Hahnemann Medical School. He currently serves on the staff of Allentown Hospital and, in the past, has served as Assistant Chief of Staff and as Chief of the Department of

Obstetrics and Gynecology. He is a member of the Lehigh County Medical Society, the Pennsylvania Medical Society and the American Medical Association. He is a Fellow of the American College of Surgeons and of the American College of Obstetricians and Gynecologists. He is currently Chairman of the American College of Obstetricians and Gynecologists, Pennsylvania Section.

2. Plaintiff Allen J. Kline is a physician licensed to practice osteopathic medicine and surgery in Pennsylvania. He received his medical education at the College of Osteopathic Medicine & Surgery in Des Moines, Iowa. He served his internship at the Cherry Hill Hospital and Medical Center, and was a resident at the Albert Einstein Medical Center, Northern Division, in Philadelphia. He is certified by the American

College of Obstetricians and Gynecologists and is a Diplomate of the National Board of Examiners of Osteopathic Physicians and Surgeons. He is a member of the Philadelphia County Osteopathic Medical Association, the Pennsylvania Osteopathic Association and the American Osteopathic Association. He is a Junior Fellow of the American College of Obstetricians and Gynecologists. He is currently on the staff of the Albert Einstein Medical Center, Northern Division, and he is a member of the Operating Room Subcommittee of that hospital. He is a Clinical Instructor of Obstetrics and Gynecology at the Temple University Medical School and an Assistant Professor of Clinical Sciences at the College of Osteopathic Medicine and Surgery in Des Moines, Iowa. He is a physician at the Northeast Women's Center and has a private practice with two fellow osteopaths

specializing in obstetrics and gynecology.

3. Plaintiff Francis L. Hutchins is a physician licensed to practice medicine and surgery in Pennsylvania. He is a graduate of Howard University College of Medicine. He is certified by the American Board of Obstetrics and Gynecology and is a Diplomate of the National Board of Medical Examiners. He is currently on the staff at Hahnemann Hospital in Philadelphia where he serves as the Director of Ambulatory Affairs and Community Medicine of the Department of Obstetrics and Gynecology and as an Assistant Professor of Obstetrics and Gynecology. He is also Director of the Family Planning Clinic at Hahnemann Medical College and Hospital and is engaged in the private practice of obstetrics and gynecology in Philadelphia.

4. Plaintiff Thomas E. Allen is a physician licensed to practice medicine and surgery in Pennsylvania. He is a graduate of the University of Pittsburgh School of Medicine. He has been a Diplomate of the American Board of Obstetrics and Gynecology since 1964. He is also a Fellow of the American College of Obstetricians and Gynecologists. He is an Associate Clinical Professor in the Department of Obstetrics and Gynecology at the University of Pittsburgh School of Medicine. He is an active staff member of the Magee Women's Hospital and is on the consulting staff of Presbyterian University Hospital in Pittsburgh. He was active in planning, establishing and administering Women's Health Services, Inc. and he is currently the medical director of Women's Health Services, Inc. He also has a private practice with three other physicians specializing

in obstetrics and gynecology.

5. The Pennsylvania Section is an organization of over 1,100 physicians who specialize in the practice of obstetrics and gynecology. The Pennsylvania Section is affiliated with the American College of Obstetricians and Gynecologists ("ACOG"). ACOG is an organization of more than 23,000 physicians throughout the United States who specialize in the practice of obstetrics and gynecology. The members of the Pennsylvania Section and of ACOG are dedicated to providing the highest quality medical care to their patients consistent with currently accepted medical practice.

6. At a meeting of the Advisory Council of the Pennsylvania Section held on September 1, 1982, the provisions of the Pennsylvania Abortion Control Act were reviewed and the Advisory Council unanimously concluded that the Act, if

implemented, would "represent a major intrusion into the rights of the individual resulting in harassment of the patient and markedly interfering with the ability [of the physician] to render good care."

7. Plaintiff Planned Parenthood of Southeastern Pennsylvania (PPSP) is a non-profit corporation which offers pregnancy testing and options counseling at all of its clinic locations by appointment. The Center City Philadelphia Clinic offers these services Monday through Friday. Hours vary at the other locations. Abortion counseling and pregnancy termination are provided on Tuesday, Wednesday, Thursday, and Saturday at PPSP's Center City Philadelphia Clinic.

8. PPSP performs approximately 2,400 first trimester abortions per year. The abortion procedure presently costs full-payment patients $190.

9. PPSP accepts medical assistance, in lieu of payment from the patient. PPSP is reimbursed $50 by the Commonwealth of Pennsylvania for procedures performed on medical assistance patients. The physician also receives a payment of $35 per procedure from the Commonwealth. Approximately 25-30% of the abortions PPSP performs are for medical assistance patients.

10. A patient at PPSP may use medical insurance to pay for her abortion. Although PPSP has contracted with some insurance carriers for direct reimbursement, in most cases PPSP receives the fee directly from the patient who is then reimbursed by her insurance carrier. When necessary, PPSP staff fill out appropriate insurance forms. Approximately 10% of PPSP's abortion patients use insurance to pay for the procedure. Some women choose not to seek reimburse-

ment from their insurance company because they wish to keep the fact that they have had an abortion confidential and fear that family members or fellow workers will learn that they have had an abortion when forms are processed.

11. When a woman, suspecting she is pregnant, presents herself at a PPSP clinic, she is given a pregnancy test and then examined by a nurse practitioner or physician. Women who suspect that they just became pregnant are offered early detection by means of a blood test or special urine test. Once it is determined that she is pregnant, a woman is encouraged to participate in an individual options counseling session with a PPSP counselor. These sessions usually last 30-45 minutes. Minor patients are required to visit the PPSP clinic to participate in options counseling prior to the day of their

abortion.

12. Options counselors are volunteers or staff counselors who have completed a training program certified by Temple University and administered by PPSP. This training program consists of 43 hours of group sessions which focus on factual information regarding adoption, abortion, contraception, referral resources and counseling techniques.

13. Each patient is required to participate in an individual abortion counseling session on the day her procedure is scheduled. In this session, the counselor and the patient discuss the patient's medical history, personal situation and feelings about abortion. The counselor explains the abortion procedure and its risks. Post-abortion care and contraceptive plans are also explored. In this session the informa-

tion necessary for informed consent under current law is presented to the patient. These sessions routinely last 20-30 minutes. If the patient has been accompanied to the clinic by a person they wish to involve in the counseling, that person will be included for part of this session. In many cases the abortion counselor will serve as a support person and accompany the woman through the procedure.

14. Abortion counselors are members of PPSP's counseling staff or college student interns working under the supervision of a staff counselor. Abortion counselors are required to have a college degree and experience in a health or social services related field. All have had on-site training in pregnancy counseling and abortion care and are required to participate in ongoing in-service training.

15. Plaintiff Elizabeth Blackwell Health Center for Women (EBHC) is a non-profit corporation which provides approximately 1,800 first trimester abortions each year at its clinic in Philadelphia. The fee for the procedure is $190. If a woman wishes to use her medical insurance, as do approximately 5% of EBHC's patients, the fee is paid to EBHC. When necessary, the clinic staff fill out applicable forms so that the patient may be reimbursed. Many women choose not to use their medical insurance because they fear that their employer or spouse will learn that they have had an abortion. EBHC accepts reimbursement from the Commonwealth for the 33% of its patients who are eligible for medical assistance.

16. Pregnancy testing and options counseling are provided at EBHC facilities on Tuesday and Thursday

evenings. Abortions are provided at EBHC facilities on Friday and Saturday by physicians specializing in obstetrics and gynecology who are hired as independent contractors by EBHC.

17. Women approach EBHC in one of two ways. Women who believe they are pregnant but have not yet had a pregnancy test will attend a pregnancy testing and options counseling session on either Tuesday or Thursday evening. At that time they will have a urine test after which a pelvic examination is performed by a physician or nurse practitioner. After it is determined that a woman is pregnant and, if so, how far her pregnancy has progressed, she will speak with one of the volunteer options counselors to explore how she wishes to deal with her pregnancy.

18. Approximately one half of the 2,000 women who came to the EBHC

clinic in this manner in 1981 proceeded to terminate their pregnancies via abortion at the EBHC. Of the 5% of the women who decided to carry their pregnancy to term, approximately one-third participated in EBHC's maternity related services. The remaining 45% of the women either sought first trimester abortions from another provider (who was more conveniently located, operated in a hospital setting, or had general anesthesia available) or required a second trimester abortion which EBHC could not provide.

19. Other women contact EBHC after already having a pregnancy test at a family planning clinic, doctor's office, or other medical facility. If these women are undecided about abortion, they are informed that options counseling is available to them free of charge. If, however, a woman has already decided she wants an abortion, she will be scheduled

for the procedure over the telephone and asked to bring verification from her doctor that she is pregnant. An appointment is usually available within one week's time.

20. In an individual options counseling session, the options counselor and the woman discuss the woman's feelings about her pregnancy and explore whether she wishes to carry the pregnancy to term, place her child for foster care or adoption, or whether she wishes to terminate the pregnancy by abortion. The counselor provides the woman with resources in the community that may help her to effectuate her choice.

21. In addition, the options counselor describes the abortion procedure, outlines birth control methods for future use, and discusses whether the woman has arranged for financial resources and personal support systems

during this difficult period of time. If a friend has accompanied the woman to the Center, the options counselor will first speak with the woman alone. If requested by the patient, the options counselor will invite the accompanying person(s) to join the counseling session.

22. Options counseling at EBHC is performed in as non-judgmental a manner as possible. The average individual counseling session lasts approximately 30 minutes. When a woman is having difficulty making a decision, or wishes to explore more fully her feelings, the counseling session can last up to one hour or the woman can be rescheduled for an additional appointment on another day.

23. Options counselors are volunteers. They must attend a 13-week training program (three hours per week) taught by EBHC's Evening Services

Coordinator, Sandra Herman. They remain under her supervision at all times. In addition, options counselors observe sessions with experienced counselors and staff for several weeks before counseling women on their own. As a result of the volunteer counseling program, EBHC is able to provide in-depth counseling to 60 patients each week for the minimal cost of training and supervising the volunteers.

24. All women are required to attend a group counseling session at EBHC on the day of their abortion, whether or not they have participated in options counseling. In this session, the women explore their feelings about the abortion procedure with a counselor who is trained in the group process. This session is also used to convey the information necessary for informed consent under existing law. The abortion

procedure and its risks are explained and alternatives to abortion are presented. The procedure for routine and emergency post-abortion medical treatment is outlined. Doctors are available to answer medical questions that the counselor is unable to answer. Different forms of contraception are also explained. Each group session lasts approximately 45 minutes.

25. EBHC prefers to do group rather than individual counseling on the day of the abortion because, in the experience of its staff, the group provides a good support system for women attending the clinic. The group makes the abortion procedure less threatening and women feel less isolated.

26. Counselors are trained to watch for women who are ambivalent about their decision to have an abortion. In circumstances where hesitation is shown,

the woman is taken from the group counseling session and given individual counseling. If the counselor believes that the woman is not positive that she wishes to have an abortion, the counselor and the woman discuss it further. The woman may be sent home to have more time to reflect on her choice.

27. Group counselors are trained in-house under the supervision of EBHC's Assistant Director, Cynthia Waters Jones, who has been counseling patients at EBHC for seven years. Training consists of familiarization with the literature, observation and co-counseling with experienced counselors. The training program is completed in approximately 70 hours over a six-week period.

28. Plaintiff Women's Health Services (WHS) is a non-profit corporation which operates a clinic in Pittsburgh, Pennsylvania. Pregnancy testing

and counseling are available at the clinic Monday through Saturday. Abortions are performed Tuesday, Friday, and Saturday. Patients who have already had a pregnancy test may schedule their abortion and a counseling session over the phone. An appointment can usually be scheduled in approximately one week's time.

29. WHS provides approximately 14,300 pregnancy tests and 9,500 first trimester abortions each year. The abortion procedure costs $190. If a patient wishes to use her medical insurance, as do approximately 15% of WHS's patients, WHS receives the fee from the patient and she is reimbursed by her insurance carrier. When necessary, WHS staff will fill out appropriate insurance forms. Many women choose not to seek reimbursement from their insurance company because they fear their spouse or employer will

learn that they have had an abortion. If eligible for medical assistance, as are approximately 20-25% of WHS's patients, the clinic takes the medical assistance information and seeks reimbursement from the Commonwealth.

30. In 1981, one thousand three hundred twenty-three (14%) of WHS"s abortion patients were minors. WHS encourages minors to bring a parent or other adult with them. Because WHS believes that parental involvement should be encouraged, WHS clinic counselors are instructed to offer to speak with a minor's parents if the minor would prefer that to making direct contact herself. When minors refuse to inform their parents under any circumstances, their wishes are respected.

31. When they present themselves at the WHS clinic, all women are examined by a nurse practitioner or physician's

assistant and are given a pregnancy test and blood work-up. In addition, all women are required to have an individual interview with a WHS counselor on the day their abortion is scheduled. These interviews routinely last 40 minutes to an hour. In this interview, the abortion procedure and other alternatives are explained to the patient. If the patient appears ambivalent, the WHS counselor will suggest that a new appointment be made to give the patient more time to consider her decision. On occasion, the WHS clinic will not permit the patient to have an abortion if the staff is convinced of her ambivalence. This is rare, however, because the great majority of WHS's patients have decided to have an abortion before seeking medical attention.

32. More extensive personal counseling is available at no charge to

patients of WHS before or after they have made a decision regarding their pregnancy, or after the abortion procedure, and patients are encouraged to utilize it.

33. Interview counseling is provided at WHS by paraprofessional staff counselors. There are no specific educational requirements for this group. They are selected on the basis of personal qualifications and maturity.

34. Personal counselors at WHS are professional therapists who have master's degrees and at least five years of clinically supervised experience.

35. Both the paraprofessional and professional counselors at WHS begin their employment with 35 hours of medical and counseling orientation and additional on-the-job supervision is provided by the associate medical director, the director of counseling and

training, and the director of clinical services. WHS also has an ongoing training module comprised of weekly in-service training and quarterly individual supervision.

36. Plaintiff Reproductive Health and Counseling Center (RHCC) is a for-profit corporation which operates a clinic in Chester, Pennsylvania, at which approximately 2,900 first trimester abortions are performed each year. An abortion currently costs the client $190. If a patient has medical insurance, her insurance usually covers all or part of the abortion cost. When necessary, RHCC staff fill out appropriate insurance forms. Approximately 25% of RHCC patients use insurance to pay for their abortion. Other patients who have insurance do not use it for fear that their employer or spouse will discover the abortion. RHCC accepts

reimbursement from the Commonwealth of $50, with the performing physician also receiving $50, for the 22% of its patients who are on medical assistance.

37. Pregnancy testing and options counseling are available at RHCC from 9 a.m. to 4 p.m., Monday thru Friday, and 10 a.m. to 1 p.m. on Saturday.

38. A woman's first contact with RHCC is usually by telephone. Women who call RHCC may or may not have had a pregnancy test prior to the call. Before any appointment is made, the women must have had a positive pregnancy test. Telephone counselors refer women to RHCC or to the agency closest to her home or place of work for the test. If a woman comes to RHCC for her pregnancy test, a trained options counselor is always available to talk with her about her pregnancy. If the woman has already had a positive

test when she calls RHCC and wants to terminate her pregnancy, an abortion appointment can be scheduled, usually within one week's time. If the woman indicates uncertainty about her decision, the telephone counselor will recommend her making an appointment to talk further with an options counselor about her decision. All minors who have not involved their parents in the decision are strongly urged to attend counseling.

39. The purpose of an options counseling session is to let the woman know about each of the three options available to her: carrying to term and keeping the child, carrying to term and giving the child up for adoption, and pregnancy termination. The counselor helps the woman to talk about her pregnancy and what each of these three options might mean to her and to people who are important to her (parents,

spouse, partner and friends). The role of the counselor in these sessions is to support the decision of the woman and to provide information which would be necessary for her to act on her decision.

40 At RHCC pre-abortion counseling, in which each woman must participate on the day of her abortion, is different from options counseling because it is generally assumed that the woman has made the decision to terminate her pregnancy. If at any time during the pre-abortion counseling the woman indicates ambivalence or dissatisfaction with her decision, the counselor may recommend additional counseling to allow the woman to explore her options further. In a private session, the counselor discusses with the woman her decision to have an abortion and her feelings about the decision, and reviews her medical history with her. Information necessary

for informed consent under existing law is provided to women in groups of four. The counselor describes the medical procedure, reviews the risks and complications of the procedure and answers questions or addresses concerns.

41. Pre-abortion and options counselors are trained in-house by RHCC's head counselor, Jane Green, who has nine years of counseling experience. They remain under her supervision at all times. Formal training consists of six sessions which explore current attitudes towards abortion and its legal status, pregnancy alternatives and contraception counseling, the clinic's operation, the abortion procedure, and confidentiality. In addition, counselors are required to attend periodic in-house training sessions, seminars and workshops.

42. In his various professional affiliations, plaintiff Fetterman has

had occasion to meet and work with a large number of physicians who provide abortions. It is his belief that the vast majority of these physicians are highly competent, ethical professionals who have a deep and abiding commitment to the well-being of their patients and to the highest standards of medical care.

43. Plaintiff physicians believe that if the provisions of the Abortion Control Act become effective some physicians who currently provide abortions will restrict or forego the performance of abortions.

44. Among the patients of plaintiff physicians and plaintiff clinics are women who have sought abortions because of their age, psychological, familial or financial condition, or because they suffer such diseases or conditions as diabetes, hypertension, cardiac disease, kidney disease, a history of post-partum

hemorrhaging or sickle cell anemia and, therefore, carrying a pregnancy to term would severely endanger their health or life.

45. In 1980, approximately 63,970 Pennsylvania residents obtained abortions in Pennsylvania.

* * * *

84. Determination of gestational age is inexact, with a margin for error of plus or minus two weeks.

* * * *

91. Some women suffer from psychological problems after having undergone an abortion.

92. Some women show a psychological improvement after having undergone an abortion.

93. It is contrary to currently accepted medical practice to perform a non-cosmetic surgical procedure merely

because the patient wishes it to be done; rather, there must be a diagnosis and proper medical indication for the procedure.

94. Plaintiffs Hutchins, Kline and Allen are associated with medical facilities which employ trained counselors to provide information and options counseling to women seeking abortions.

95. Prior to performing an abortion, plaintiff physicians or trained counselors at plaintiff clinics and the clinics where plaintiff physicians perform abortions discuss the abortion decision with the woman and obtain her consent to the procedure.

96. It is generally accepted among physicians, paramedics and medical counselors that the type of information necessary to secure informed consent varies substantially with the individual patient and with the condition to be treated.

97. A fundamental aspect of informed consent is that the patient be told the options available to her or him.

98. There is a general presumption in favor of broad disclosure, but some patients are traumatized by such broad disclosure.

99. In order to promote the fundamental values of patient well-being, individual autonomy and self-determination, patients need relevant information. It is generally agreed that the disclosure process should not be a rote recitation, either orally or in writing of the risks of a medical procedure. Instead, the physician or counselor and the patient should have a thoughtful discussion which involves great sensitivity, subtlety, and sometimes complexity about a matter of great importance to the patient.

100. The physician or counselor must be free to listen to the patient, to ask questions of the patient, and to respond to the patient's concerns. The disclosure process must be tailored to the particular informational and emotional needs of each patient.

101. Most, but not all, women who seek abortions have already made the decision that an abortion would be in their best interest prior to scheduling an appointment with plaintiff physicians or plaintiff clinics.

102. Some women who have decided that an abortion would be in their best interest prior to scheduling an appointment have done so without full knowledge of the agencies and other assistance available for mothers and their children.

103. Plaintiff physicians do not believe that it is their duty to attempt to persuade a patient to carry her preg-

nancy to term when an abortion is medically indicated and when she has already resolved that she desires an abortion.

104. It is the professional opinion of plaintiff physicians that it is not in the best interest of their patients to specifically inform them of every potential physical or psychological risk involved in an abortion procedure no matter how remote and that such information may confuse the patient or create psychological trauma to the patient.

105. In the professional opinion of plaintiff physicians, informing their patients that there may be detrimental physical and psychological effects from an abortion which are not accurately foreseeable would not be in the best medical interest of women seeking abortions. Such information, standing alone, will, in the professional opinion of

plaintiff physicians, only serve to confuse the patient and to make her more afraid without providing any information which will make her decision informed.

106. Some women who have undergone abortions would not have had an abortion if provided with all the information required to be provided by the Act.

107. Some women who have sought counseling regarding whether or not to have an abortion were not provided with the following:

a. names of public and private agencies which will assist a mother and her child;

b. A step-by-step description of the particular abortion procedure to be used; or

c. information on the level of pain they will experience during the abortion procedure.

108. If a woman has doubts about the abortion because of concern about the state of the fetus, the availability of information such as that set forth in Section 3205(a)(2) of the Act describing fetal characteristics may be helpful.

109. For many women, the decision to have an abortion is an extremely difficult and painful one, and it is a decision which they reach only after a good deal of thought; to offer a woman the opportunity to read a description of fetal characteristics or a list of agencies in situations where abortion has been determined to be the only viable alternative may create anxiety, disquiet and fear.

110. Based on their professional experience as clinic directors, it is the plaintiff clinic directors belief that once the decision to have an abortion

has been made, exposure to literature required by Section 3208 undermines plaintiff clinics' ability to counsel patients according to individual needs of the patients and forces clinic personnel to counsel patients in a manner inconsistent with their professional judgment.

111. Plaintiff physicians believe that the information required to be given to patients seeking abortions by Sections 3205(a)(2)(i) and (ii) of the Act is legal advice which is beyond their personal expertise and the expertise of their staffs and that they would not be equipped to answer fully and completely questions which the disclosure of this information might raise with their patients.

112. It is the professional opinion of plaintiff physicians that informing their patients of the poten-

tial availability of medical assistance or support from the father of the child is not medically indicated in all cases and may mislead their patients.

* * * *

119. The Section 3205 requirement that physicians directly provide informed consent and the Section 3204 requirement that physicians provide a private medical consultation will require extensive changes in the RHCC's operating schedule. Physician schedules will need to be expanded to include two to three medical consultation and counseling sessions per week, with women scheduled for abortions at least 24 hours later. Because of doctors' normally busy office hours, surgery and hospital schedules, it may be difficult to find available physicians to provide these services, especially during the evening hours

which are most convenient for patients. The physician consultation and counseling may increase the need for physician time by 20 hours per week.

120. The Section 3205 requirement that physicians personally provide information necessary for informed consent will require plaintiff clinics to change their current practices and will increase costs to the plaintiff clinics. Plaintiff clinics intend to pass these increased costs along to their patients.

* * * *

182. Plaintiff physicians have had patients who have suffered from life endangering conditions such that carrying their pregnancies to term would have caused them severe physical harm or death; in those instances, plaintiff physicians have considered it necessary to terminate their pregnancies by

inducing labor at a time when the fetus may have become viable; in such circumstances, plaintiff physicians utilized the procedure most likely to preserve the life of the fetus, but the fetus did not survive because it was not viable; plaintiff Allen has induced labor up to 32 weeks after gestation when his diagnosis revealed that his patient was carrying a grossly abnormal fetus.

183. Plaintiff physicians have observed beating of the heart and involuntary movements of the muscles of the fetus as early as the eighth week of gestation; plaintiff physicians have observed electrical activity of the brain of the fetus even earlier than eight weeks; a fetus of eight weeks gestational age would not be capable of sustained survival outside the uterus.

184. Neonatal studies have shown that a 27-week-old fetus's chance of

survival under ideal conditions is now approaching 10%.

185. It is the professional opinion of plaintiff physicians that the decision to call in a second physician for post-viability abortions should be left to the attending physician.

186. It is the professional opinion of plaintiff physicians that the requirement of a second physician to preserve the fetus is an unnecessary interference with a physician's best medical judgment.

187. The presence of a second physician will increase the cost of an abortion.

* * * *

192. During the past several years, numerous abortion providers, both in Pennsylvania and throughout the country have been the object of threatened violence or actual violence, including

firebombings, arson, shootings, vandalism, sit-ins and demonstrations.

193. Plaintiff clinics and physicians currently report medical data, including data relating to birth and death, to the Commonwealth as required by existing law.

194. The reporting requirements of Section 3214 will require plaintiff clinics to change their current practices

and will increase costs to the clinics. Plaintiff clinics intend to pass along these increased costs to their patients.

* * * *

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,	:	
Plaintiffs	:	
V.	:	CIVIL ACTION NO. 82-4336
RICHARD THORNBURGH, et al.,	:	
Defendants	:	

DEFENDANTS' MOTION TO VACATE INJUNCTION AGAINST ENFORCEMENT OF SECTION 3206 (PARENTAL CONSENT/JUDICIAL APPROVAL) OF THE PENNSYLVANIA ABORTION CONTROL ACT

Defendants, by their counsel, hereby move this Court for an order vacating the injunction against enforcement of Section 3206 of the Pennsylvania Abortion Control Act. In support of this motion, defendants aver, as follows:

1. Section 3206 of the Pennsylvania Abortion Control Act prescribes

standards to be followed in abortions for women under the age of 18 and women who have been adjudged incompetent. 18 Pa. Cons. Stat. §3206.

2. This Court previously denied a preliminary injunction against enforcement of Section 3206. American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh, 552 F.Supp. 791, 800-803 (E.D. Pa. 1982).

3. The Court of Appeals held that enforcement of Section 3206 should be enjoined until the Pennsylvania Supreme Court issued rules assuring that court proceedings contemplated by the statute would be carried out confidentially and with appropriate dispatch. American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh, 737 F.2d 283, 296-297 (3d Cir. 1984).

4. On November 26, 1984, the Pennsylvania Supreme Court adopted new rules, effective immediately, governing proceedings under Section 3206. A copy of the new rules is attached to defendants' supporting brief.

5. As we explain more fully in the accompanying brief, the new rules more than adequately ensure that proceedings pursuant to Section 3206 are conducted quickly and confidentially.

WHEREFORE, defendants respectfully request that the injunction against enforcement of Section 3206 be vacated.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA,	:	CIVIL ACTION NO. 82-4336
v.	:	
RICHARD THORNBURGH, et al.	:	

ORDER

NOW, February 22, 1985, upon consideration of defendants' motion to vacate injunction against enforcement of section 3206 of the Pennsylvania Abortion Control Act, plaintiffs' response thereto, the memoranda of law submitted by the parties, and because:

1. Section 3206 of the Pennsylvania Abortion Control Act provides that unemancipated women under the age of eighteen must secure parental consent or judicial approval prior to obtaining an

abortion. Noting that "the state must provide 'an alternative procedure whereby a pregnant mother may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests,'" the Third Circuit held that section 3206 should be enjoined until such time as the state has promulgated regulations governing judicial proceedings under section 3206. American College of Obstetricians v. Thornburgh, 737 F.2d 283, 296-297 (3d Cir.1984), quoting City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2498 (1983).

2. Defendants filed an appeal from the Third Circuit's ruling on September 26, 1984. Thornburgh v. American College of Obstetricians, 53 U.S.L.W. 3291 (U.S. September 26, 1984) (No. 84-495). This appeal is still

pending, and among the questions presented for appeal is the Third Circuit's holding pertaining to section 3206.

3. On November 26, 1984, the Pennsylvania Supreme Court adopted new rules governing proceedings under section 3206. Defendants now seek an order vacating the injunction on section 3206 in light of the new regulations.

4. Federal Rule of Civil Procedure 62(c) provides that a court may modify an injunction during the pendency of an appeal as the court deems necessary "for the security of the rights of the adverse party." This rule has been described as "'merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances to justify.'" Ideal Toy Corporation v. Sayco Doll Corporation, 302 F.2d

623, 625 (2d Cir. 1962), quoting 7 Moore ¶ 62.05. In Ideal Toy, the court refused to vacate an injunction when an appeal was pending absent permission from the higher court to reopen. Similarly, in United Parcel Services v. United States Postal Service, 475 F. Supp. 1158, 1163 (3d Cir. 1979), Judge Becker held that when an appeal is pending from a preliminary injunction, a district court has jurisdiction under Rule 62(c) to grant only such relief from the injunction as may be necessary to preserve the status quo pending appeal. See also Morning Telegraph v. Powers, 450 F.2d 97 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

5. I conclude that an order dissolving the injunction on section 3206 imposed by the Third Circuit is not necessary to preserve the status quo. Rather, at this time, an order suspending

the injunction would significantly alter it. Therefore, I am without jurisdiction to issue the order defendants seek. IT IS ORDERED that defendants' motion to vacate the injunction against enforcement of section 3206 of the Pennsylvania Abortion Control Act is DENIED.

Daniel H. Huyett, 3rd, Judge

Supreme Court, U.S.
FILED
AUG 30 1985

No. 84-495

In The

Supreme Court of the United States

October Term, 1985

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. Whether this Court's mandatory appeal jurisdiction under 28 U.S.C. § 1254(2) requires it to review a non-final order of the court of appeals, reversing in part the district court's order largely denying appellees' application for a preliminary injunction against enforcement of the Pennsylvania Abortion Control Act.

2. Whether the court of appeals applied the proper standard of review when, upon concluding that the district court used an erroneous legal standard, it found that the principles set forth in this Court's decisions compelled the conclusion that certain sections of the Pennsylvania Abortion Control Act are unconstitutional on their face.

3. Whether the court of appeals properly concluded, in light of this Court's prior decisions, that sections of the Pennsylvania Abortion Control Act requiring that specific information be provided to secure the woman's informed consent, prescribing the choice of abortion method and the standard of care for post-viability abortions, requiring the presence of a second physician for all post-viability abortions, and requiring the filing and public disclosure of detailed reports regarding abortions are unconstitutional.

4. Whether the court of appeals' holding that the provisions of the Pennsylvania Abortion Control Act requiring parental consent or judicial authorization for abortion by a minor cannot be enforced until the Pennsylvania Supreme Court promulgates rules to implement the judicial authorization provisions is moot in light of the promulgation of those rules.

5. Whether the constitutionality of the Pennsylvania Supreme Court rules implementing the judicial authorization provisions of the Pennsylvania Abortion Control Act should first be considered by the district court, and, if not, whether those rules would result in an unconstitutional infringement of minors' fundamental right to abortion, requiring that the parental-judicial consent provisions of the Act be enjoined.

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STATEMENT

This is an appeal from an interlocutory order of the United States Court of Appeals for the Third Circuit. The court of appeals reversed an order of the United States District Court for the Eastern District of Pennsylvania largely denying a request for a preliminary injunction against enforcement of the Pennsylvania Abortion Control Act, 18 PA. CONS. STAT. ANN. §§ 3201-20 (Purdon 1983) (the "Act"), and remanded the matter for further proceedings consistent with its opinion. The procedural history of the case is set forth in the Brief for Appellants at pages 4 through 9.

In 1974, the Pennsylvania General Assembly enacted the state's first Abortion Control Act over the governor's veto. No. 209, 1974 Pa. Laws 639 (repealed) (formerly codified at 35 PA. STAT. ANN. §§ 6601-08 (Purdon 1977)). After five years of litigation, many of the provisions of this statute were finally held unconstitutional, including provisions requiring spousal or parental consent, regulating the choice of abortion method for post-viability abortions, and banning advertisements for abortion. *See Planned Parenthood Ass'n v. Fitzpatrick,* 401 F. Supp. 544 (E.D. Pa. 1975) (three-judge court), *aff'd mem. in part sub nom. Franklin v. Fitzpatrick and vacated and remanded mem. in part sub nom. Beal v. Franklin,* 428 U.S. 901 (1976), *modified on remand,* No. 74-2440 (E.D. Pa., September 16, 1977) (unreported), *aff'd sub nom. Colautti v. Franklin,* 439 U.S. 379 (1979); *see also Doe v. Zimmerman,* 405 F. Supp. 534 (M.D. Pa. 1975) (three-judge court). In 1978 the Pennsylvania legislature attempted to restrict access to abortion by severely limiting medical assistance funding for abortions. This effort was also found unconstitutional by the court of appeals. *Roe v. Casey,* 623 F.2d 829 (3d Cir. 1980).

In 1981, members of the House of Representatives again introduced legislation aimed at limiting abortion, based on a model statute developed by Americans United for Life, a Chicago-based anti-abortion organization. H. 1725, 1981 Sess., Pa. General Assembly; *see* Note, 87 DICK. L. REV. 373, 382 n.84 (1983). Although rejected by the relevant legislative committee, 38 PA. L.J.-REP. 1 (1981), the bill was brought to the House floor as an "amendment" to a bill regulating "tough-guy" competitions. S. 742, 1981 Sess., Pa. General Assembly. The initial version of the bill was then amended to eliminate such blatantly unconstitutional provisions as one that allowed any person, agency or association, on behalf of the "unborn child," to seek an injunction against any individual believed to be in violation of the Act.[1] Nevertheless, Pennsylvania's Governor, Dick Thornburgh, vetoed the bill on December 23, 1981, stating:

> I am concerned that some of the detailed, complex and burdensome requirements of the bill, accompanied as they are by severe criminal penalties, could well foster an atmosphere in which many physicians would be deterred from providing the kind of abortion-related medical services to which the U.S. Supreme Court has held their patients are constitutionally entitled. This could well disrupt the traditional doctor-patient relationship and impinge upon the right of physicians to practice. Of even greater concern is the potential for more experienced and conscientious physicians to refrain from involvement in even medically necessary abortions, and to abandon the field to marginal practitioners. It could even lead to a resurgence of "back alley" abortions, which no thoughtful person would wish to happen.

Veto Message to the Senate (Dec. 23, 1981), *quoted in American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 737 F.2d 283, 289 n.4 (3d Cir. 1984).

1. The bill's original version also contained the following: (1) a requirement that detailed color photographs of dead aborted fetuses be made available to the woman prior to an abortion; (2) a requirement that dead aborted fetuses be disposed of under laws for disposal of dead persons and that death certificates be issued after each abortion; (3) a requirement that the woman notify the father prior to an abortion (whether or not her husband); and (4) a provision prohibiting in vitro fertilization conducted for purposes other than subsequent implantation. H. 1725, 1981 Sess. §§ 5, 7, 8, 12(d), 13(i). *See* Note, 87 Dick. L. Rev. 373, 382 n.84 (1983).

After some revision, the Abortion Control Act was again introduced on the floor of the House on June 8, 1982, this time as an amendment to a bill regulating paramilitary training. After passage by the General Assembly, this new version was signed by the Governor on June 11, 1982, to become effective December 8, 1982. As stated by the chief sponsor and leader of the floor debates when initially explaining the bill at a news conference:

> Look, we can't stop abortions. The message we are sending to doctors is this: We can't stop you from performing abortions. We wish we could, and we hope to God that some day we'll get the Human Life Amendment so we can. But until that time there are going to be regulations you'll have to follow if you are going to perform abortions.

Remarks of Rep. Stephen Friend *quoted at* 737 F.2d 288.

SUMMARY OF THE ARGUMENT

I. Although conceding that the order of the court of appeals is not final, appellants bring this matter as an appeal, invoking 28 U.S.C. § 1254(2). This Court has routinely held that appeals from cases before the courts of appeals challenging the constitutionality of a state statute can be brought only from final orders, despite the absence of language compelling finality in the statute. That finality requirement is consistent with the statute's legis-

lative history, the congressional policy of reducing the mandatory docket of this Court and the sound rule against piecemeal appeals. Appellants have presented no policy considerations sufficient to override this finality requirement, and, accordingly, the appeal should be dismissed.

II. The court of appeals correctly concluded that the district court, in ruling upon an application for preliminary injunction, applied an erroneous legal standard, particularly in light of this Court's decisions issued after the district court's original order but prior to the decision of the court of appeals. Exercising its plenary scope of review on questions of law and applying the proper legal standard, the court of appeals concluded that certain sections of Act were unconstitutional on their face. Since no factual presentation could alter this obvious unconstitutionality, the court of appeals appropriately reached the merits with respect to these sections.

III. A. In order for the consent of a woman seeking an abortion to be deemed "informed," Sections 3205 and 3208 of the Act mandate that certain pieces of information be provided to all women in all cases. Appellants have conceded that the physician-only counseling and the 24-hour waiting period requirements of Section 3205 are unconstitutional. The court of appeals also properly recognized that the specific informational requirements cannot be sustained. These requirements are plainly designed not to inform the woman's consent but rather to discourage her from having an abortion. By forcing the physician or counselor to deliver a message prescribed by the Commonwealth, and by specifying a litany of information that must be provided irrespective of the woman's circumstances, these requirements unconstitutionally intrude upon the physician's discretion.

B. Section 3210(b) of the Act compels a physician performing a post-viability abortion to choose the medical procedure that would provide the best opportunity for the fetus to be born alive unless that procedure would present a "significantly greater medical risk to the life or health of the pregnant woman" than another procedure. This criminal provision also prescribes the standard of care that must be employed in post-viability abortions. The plain language of the statute would compel the physician to elevate potential life over the life and health of the woman in contravention of the fundamental constitutional right recognized by this Court's decisions. Since this plainly unconstitutional requirement cannot be eliminated by any reasonable construction of the statute, Section 3210(b) must fall.

Moreover, both the choice of technique and the standard of care prescriptions impose criminal liability for a series of determinations by the physician that are, at best, imprecise. Section 3210(b) thus fails to give the physician fair notice of what medical decisions may contravene the statute, encouraging arbitrary prosecutions and threatening to inhibit the exercise of constitutionally protected rights. This section is unconstitutionally vague and must be stricken.

C. Section 3210(c) of the Act requires the attendance of a second physician for post-viability abortions. On its face, this criminal provision does not allow an exception when the attendance of a second physician cannot be secured because of a medical emergency. Appellants' contention that a medical emergency exception can be construed from language in a separate subsection of Section 3210 cannot be squared with other sections of the Act that provide express exceptions for medical emergencies. The absence of an express medical emergency exception in

Section 3210(c) was intentional, and the provision is therefore unconstitutional.

D. The Act requires that numerous reports containing highly detailed information about individual abortion procedures, complications and maternal deaths be filed and be made available for public inspection and copying. In proceedings after remand, the district court concluded that public disclosure of reports not enjoined by the court of appeals would increase the frequency and intensity of acts of violence and harassment directed against women seeking abortions and abortion providers by opponents of abortion, and that appellants failed to justify this intrusion upon the exercise of fundamental constitutional rights. These conclusions strongly support the decision by the court of appeals enjoining some of the reporting and public disclosure requirements because they unconstitutionally burden the woman's exercise of her fundamental right to choose an abortion.

E. Section 3206 of the Act requires that an unemancipated minor woman must obtain the consent of her parent or guardian or petition the court for authorization before she may have an abortion. The court of appeals concluded that Section 3206 withstood a facial challenge to its constitutionality, but enjoined enforcement of the section until the Pennsylvania Supreme Court promulgated procedural rules to implement the provision. In November, 1984, rules were promulgated, and, accordingly, this aspect of the appeal is moot. However, the question of whether those rules establish a constitutional procedure must be determined before this section can be permitted to take effect. That determination should be made initially by the district court.

F. If the Court considers their adequacy, the rules must be found unconstitutional. They deprive the minor

woman of a procedure free from parental involvement by according an absolute right to the minor's parents to attend the judicial hearing. The rules fail to provide for the appointment of counsel in all instances, which may deprive the minor woman of an effective opportunity to establish her case before the court. While authorizing the appointment of a guardian ad litem, the rules fail to define the circumstances when an appointment can be made or the role of the guardian once appointed. Accordingly, they threaten the possibility of a third party exercising an arbitrary veto over the minor's decision.

Thus, this Court should dismiss the appeal for want of jurisdiction, treat the appeal as a petition for writ of certiorari, and deny certiorari. Alternatively, if the Court reaches the merits, it should affirm the decision of the court of appeals in all respects.

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ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. § 1254(2) To Review A Portion Of An Interlocutory Order Of The Court Of Appeals, And The Appeal Must Be Dismissed.

In an appeal from an interlocutory order of the district court largely denying appellees' request for a preliminary injunction, the court of appeals partially reversed that order and remanded the matter for further proceedings consistent with its opinion. The court of appeals did not direct the entry of judgment for appellees on any issue, recognizing that further proceedings before the district court will take place before a final decree can be entered.[2] Accordingly, as appellants concede, the order

2. Indeed, the district court has been twice called upon to consider issues in this case since the court of appeals' decision. *See* J.A. 57a-61a; Addendum to Brief for Appellees ("Addendum") at 1a-37a.

of the court of appeals is not final. Brief for Appellants at 21.

In *Slaker v. O'Connor,* 278 U.S. 188 (1929), this Court established that finality was required for appeals brought under the predecessor to 28 U.S.C. § 1254(2), Section 240 (b) of the amended Judicial Code of 1925, Act of February 13, 1925, Pub. L. No. 415, 43 Stat. 936, despite the absence of express language requiring finality. The finality requirement was applied to Section 1254(2) itself in *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901 (1956) (*per curiam*), and has not since been disavowed. Indeed, appellants concede that *Slaker* is controlling here, but contend that it should be overruled. Brief for Appellants at 22-25. That contention is without merit.

As early as 1891, this Court established a finality requirement for mandatory appeals under jurisdictional statutes that contained no explicit finality language. *McLish v. Roff,* 141 U.S. 661 (1891):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. *Forgay v. Conrad,* 6 How. 201, 204. The construction contended for [that finality is not required] would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed.
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> But there is an additional reason why the omission of the word *final,* in the 5th section of the act should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally . . . to those [cases] in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. . . . The effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, with all the matters in controversy in it, by awaiting the final judgment, could be promptly decided in one appeal.

Id. at 665-67 (emphasis in original).

In 1925, Congress presumably intended the rule of *McLish* to apply when it enacted the predecessor to Section 1254(2) without an express finality requirement. *See Cannon v. University of Chicago,* 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law."). This is confirmed by the legislative history of Section 240(b), which originated as an amendment to the Judges' Bill of 1925. 43 Stat. 936, 938. That statute, drafted by Justices of the Supreme Court out of concern for their burdensome caseload, drastically reduced the mandatory appellate jurisdiction of the Court. *See* Simpson, *Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court,* 6 Hastings Const. L.Q. 297, 328 (1978).

The bill, which passed with little debate in the House of Representatives, was amended in the Senate to include Section 240(b) to retain a limited right of mandatory appeal from the courts of appeals. 66 Cong. Rec. 2750-57, 2916-28 (1925); *see also* F. Frankfurter & J. Landis, The Business of the Supreme Court 273-79 (1928). The intention was to put appeals from the courts of appeals and the state courts, "on a perfect parity, allowing a writ of error from the circuit court of appeals under condi-

tions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." 66 CONG. REC. 2923 (Senator Walsh), *quoted in* FRANKFURTER & LANDIS, *supra* at 278. The statute with which Section 240(b) was to be on parity expressly required that appeals could be taken only from a final judgment or decree. 43 Stat. 936, 937, § 237(a) (now 28 U.S.C. § 1257).

The congressional policy of restricting the mandatory docket of the Court recognized in *McLish v. Roff* is still vital. *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974); *Flanagan v. United States*, 465 U.S. 259 (1984).[3] The Court has followed this policy in its strict interpretation of jurisdictional statutes authorizing appeals, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983), and has, due to its burgeoning caseload, recently called for further restrictions, including elimination of all mandatory appeals from the courts of appeals.[4]

Most recently Congress reaffirmed this policy by limiting the jurisdiction of three-judge district courts.[5] As a result, cases challenging the constitutionality of state statutes will be routed from the district courts to the courts

3. This Court has recognized 28 U.S.C. § 1252, which explicitly allows review of an interlocutory order, as an exception to the policy of minimizing the mandatory docket of the Supreme Court, *McLucas v. Champlain*, 421 U.S. 21, 31 (1975), but has discouraged analogizing from § 1252 to § 1254(2), which it has interpreted much more strictly. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621 n.10 (1984).

4. *See Mandatory Appellate Jurisdiction of the Supreme Court —Abolition of Civil Priorities—Jurors Rights; Hearings before the Subcom. on Courts, Civil Liberties, and the Administration of Justice of the House Committee of the Judiciary*, 97th Cong., 1st Sess. 22 (1982) (letter to Congressman Kastenmeier endorsing H.R. 2406).

5. See Act of August 12, 1976, Pub. L. No. 381, 90 Stat. 1119 (repealing 28 U.S.C. §§ 2281 and 2282).

of appeals under 28 U.S.C. §§ 1291 and 1292 and to the Supreme Court under Section 1254(2) rather than directly from three-judge district courts to this Court.[6] Eliminating the finality requirement under Section 1254(2) would therefore subvert Congress' most recent effort to reduce the Court's caseload.

Also underlying the finality requirement is the "long established object and policy" of avoiding the expense and delay of piecemeal appeals, also recognized in *McLish v. Roff*. *See Abney v. United States*, 431 U.S. 651, 656-59 (1977); *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949). The potential for piecemeal review if the finality rule is abandoned is well demonstrated by this case. Portions of the Act are before this Court; others are at various stages before the district court; still others are in effect pending a final hearing.[7] If Section 1254(2)

6. The policy of insuring immediate appellate review of district court decisions granting (or denying) preliminary injunctions against enforcement of federal or state statutes is preserved by 28 U.S.C. § 1292(a)(1), authorizing immediate appeals to the courts of appeals. Thus, appellants reliance on the need for immediate appellate review as support for their interpretation of § 1254(2) is unwarranted. Brief for Appellants at 29.

7. Sections 3205, 3206, 3208, 3210(b), 3210(c), 3211(a) and 3214(a), (b), (e), (g) and (h) are currently before this Court; § 3209 and the 24-hour waiting period and physician-only counseling provisions in § 3205 were conceded by appellants before the court of appeals but reserved for further litigation; the court of appeals holding that § 3215(e) is unconstitutional was not appealed to this Court but reserved for further litigation. Since the court of appeals' ruling, the public disclosure requirements in §§ 3207(b) and 3214(f) were the subject of a full evidentiary hearing on appellees' renewed motion for a preliminary injunction. Sections 3203 and 3210(a) were construed by the court of appeals to avoid constitutional problems. Section 3215(c) is the subject of a separate state court action, and has been partially enjoined. *Fischer v. Department of Public Welfare*, 85 Pa. Commw. 215, 239-40, 482 A.2d 1137, 1148 (1984), *appeal docketed*, 67 M.D. App. Dock. (Pa. S.Ct.). The remaining sections of the Act have become operative.

mandates that this appeal be heard, then the jurisdictional provision will operate to delay a final hearing with a high likelihood that the case may return to this Court one or more times in the future. It is inconceivable that the mere absence of the word "final" bespeaks Congress' intent to depart so dramatically from sound policy and precedent. Thus, the appeal must be dismissed.[8]

II. The Court Of Appeals Applied The Appropriate Standard Of Review In Reversing The District Court's Denial Of A Preliminary Injunction In Light Of This Court's Intervening Decisions.

Between the time of the district court's ruling on the motion for preliminary injunction and review by the court of appeals, this Court decided *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*"Akron"*); and *Planned Parenthood Ass'n, Inc. v. Ashcroft*, 462 U.S. 476 (1983) (*"Ashcroft"*). Given the similarity of the statutory provisions at issue here to those rejected by this Court in these intervening cases, it was clear that the district court applied the wrong legal principles when determining the likelihood of appellees' success on the merits. Applying the appropriate standard of review, the court of appeals was compelled to reverse the decision of the district court in many respects.

The standard of appellate review of a grant or denial of a preliminary injunction is whether the lower court has abused its discretion. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). A district court never has discretion to apply the wrong legal standard. *Charles v. Carey*, 627 F.2d 772, 776 (7th Cir. 1980); *Planned Parenthood League*

8. The Court should therefore decline appellants' request that this matter be heard on writ of certiorari. Moreover, none of the reasons for which certiorari is generally granted under Rule 17 is present here. See Appellees' Motion to Dismiss or Affirm at 10-14.

v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981). Therefore, a ruling on an application for a preliminary injunction must be reversed "if the trial court has abused its discretion or committed error in applying the law." *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1242 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984), (*citing Kennecott Corp. v. Smith*, 637 F.2d 181, 187 (3d Cir. 1980)); *see also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938).

Appellants contend that the court of appeals exceeded the proper scope of review by addressing the merits of the underlying constitutional issues. However, where the district court has proceeded on the basis of an erroneous view of the applicable law and where, as here, application of the correct rule compels a resolution of the ultimate issues, the court of appeals may reach the merits. As the court concluded in *Delaware & Hudson Ry. v. United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971):

> The duty to appraise the merits at the stage of preliminary injunction is a duty of appellate as well as trial courts. Usually this appraisal is phrased in terms of probability or substantial likelihood of success after trial. Sometimes, however, the interest of justice is furthered by providing a determination on the merits, both at the trial court and on appeal, if and to the extent that the matter is ripe, notwithstanding that technically the only matter submitted is a request for a preliminary injunction. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).
>
> Insofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court. The matter stands in a different posture from that involved when there is no question or disagreement as to the

> legal principle involved, and the element of probability of success on the merits depends on a forecast as to the shape of the facts likely to emerge at trial. If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound.

The court of appeals did no more when it found that certain provisions of the Act were plainly unconstitutional on their face under *Akron* and *Ashcroft*. Accordingly, a decision on the merits with respect to these issues was fully warranted.

Appellants complain that they did not have a sufficient opportunity to develop a factual record before the district court. This argument ignores, however, that the court of appeals reached the merits only in those limited instances where no set of facts could alter the result. *See Tustin v. Heckler*, 749 F.2d 1055, 1060 (3d Cir. 1984). In any event, appellants had ample time to develop a record before the district court, far in excess of that typically accorded defendants when preliminary relief is sought. Appellants knew that preliminary relief would be sought eight weeks before the hearing on the motion for preliminary injunction, and for five weeks they knew the precise factual and legal contentions supporting that request.[9] During the period between the filing of appellees' motion and the hearing on that motion, an answer to the complaint was filed by some appellants, others moved to dismiss the complaint as to them, and all appellants filed a memorandum of law opposing a preliminary

9. The complaint, in which appellees requested a preliminary injunction, was filed on October 4, 1982. (J.A. 1a). Appellants filed their motion for preliminary injunction, together with supporting factual affidavits and a memorandum of law, on October 29, 1982. (J.A. 1a). The hearing on the preliminary injunction application did not occur until December 2, 1982. (J.A. 2a).

injunction. Thus, beyond being irrelevant to the court of appeals' decision, the absence of any evidentiary record to support appellants' contentions stems from their own failure to assemble and to adduce that evidence.

Indeed, the preview of evidence that appellants intend to present shows that they cannot create a record that would alter the court of appeals' findings. Brief for Appellants at 45-47. Some of that evidence was already part of the record on the motion for preliminary injunction.[10] Other evidence is plainly irrelevant to any consideration of the constitutionality of the sections involved.[11] Still other evidence relates solely to issues that appellees agree should first be presented to the district court.[12] Thus, to the extent the court of appeals reached the merits with respect to provisions now before this Court, its decision was fully warranted and should be affirmed.[13]

10. For example, the fact that women in Pennsylvania are not currently provided with all of the information required by § 3205 to secure their informed consent was part of the stipulated record on the preliminary injunction. (J.A. 44a).

11. For example, the fact that there may be abortion techniques that offer "a far greater chance for survival of the fetus" than other techniques cannot support § 3210(b) which, on its face, compels the physician to elevate potential life over the life and health of the woman. Nor can "the characteristics of viable fetuses" justify § 3210(c) which compels the presence of a second physician in a post-viability abortion even when a medical emergency exists.

12. The question of the constitutionality of the Pennsylvania Supreme Court rules implementing the judicial authorization procedure in § 3206 of the Act should be considered by the district court on the basis of a record to be developed by that court. *See* § III.E., *infra*.

13. As outlined below, this Court's prior decisions compel a finding that the sections of the Act at issue must be enjoined at least until a final hearing in the district court. Accordingly, if this Court should conclude that the court of appeals exceeded the proper scope of review in reaching the merits on these sections, the appropriate course is to remand the matter with an instruction that the sections at issue be enjoined pending a final hearing.

III. The Court Of Appeals Applied The Correct Principles When Assessing The Constitutionality Of The State Regulation Of Abortion At Issue In This Appeal.

Appellants and appellees agree that the court of appeals was correct in applying the principles of *Roe v. Wade*, 410 U.S. 113 (1973) ("*Roe*"), when assessing the constitutionality of the Act. Appellants have not asked this Court to re-examine those principles, and there is no sound reason to do so in light of the recent and unequivocal reaffirmation of a woman's fundamental right to choose abortion in *Akron* and *Ashcroft*.[14] Should this Court reach the merits of this appeal, the only question presented is whether the court of appeals properly applied these principles in reaching its decision as to the constitutionality of sections of the Act. As discussed below, that question must be answered in the affirmative.

A. The Informed Consent Provisions Of Sections 3205 And 3208 Unconstitutionally Interfere With The Physician-Patient Relationship And Attempt To Discourage Women From Choosing Abortions.

Like the ordinance at issue in *Akron*, Sections 3205 and 3208 of the Act prescribe in detail the manner for securing the woman's informed consent to an abortion during all trimesters of pregnancy. Seven explicit cate-

14. In *Akron*, the Court concluded that there are "especially compelling reasons" for adhering to the principles of *Roe*, noting:

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

462 U.S. at 420 n.1.

gories of information must be presented to the woman 24 hours before her consent is obtained, and five of these must be presented by the woman's physician. The physician or counselor must also inform the woman that materials printed by the Commonwealth that "describe the unborn child and list agencies which offer alternatives to abortion" are available for her review. If she chooses to review the materials and is unable to read them herself, the physician or counselor must do so and must answer any questions concerning them, in the woman's own language. Section 3208 requires that these printed materials include the following statement:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

The materials must describe the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival." *Id.*[15]

Appellants conceded before the court of appeals that the physician-only counseling and the 24-hour waiting period requirements of Section 3205 are unconstitutional in light of this Court's decision in *Akron*. 462 U.S at 446-51. The court of appeals further concluded that the spe-

15. The possibility of fetal survival is not easily nor accurately ascertainable. See nn. 22, 25, 31, *infra*. No matter how "objective" or "non-judgmental" the presentation, this information will, at a minimum, confuse the woman.

cific informational requirements must fall under the reasoning of *Akron*.

Relying on its prior decision in *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-67 (1976) ("*Danforth*"), the Court in *Akron* concluded that, "[t]he validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman." 462 U.S. at 443. The Court cautioned:

> This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to insure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth's* recognition of the State's interest in insuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.

462 U.S. at 443-44 (footnote omitted).

The informational requirements in the Akron ordinance were unconstitutional for two "equally decisive" reasons. First, "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." 462 U.S. at 444. Second, the rigid requirement that a specific body of information be given in all cases, irrespective of the needs of the patient, intruded upon the discretion of the physician thereby imposing the "undesired and uncomfortable straitjacket" warned against in *Danforth*. 428 U.S. at 67 n.8. Each of these independent reasons apply with equal force to the specific informational requirements at issue here.

The printed materials required by Sections 3205 and 3208 are a bald attempt to force the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue. The mandated description of fetal characteristics at two-week intervals, no matter how objective, is plainly overinclusive. Even if tailored to the gestational age of the particular fetus, this is not medical information that is always relevant to the woman's decision; as such, it may only serve to confuse and heighten her anxiety contrary to accepted medical practice. (J.A. 45a-46a). *See Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1021-22 (1st Cir. 1981).[16] Even the list of agencies contained in the printed form presents serious problems for the physician. The list may contain agencies that are inappropriate to the needs of the patient, placing the physician in the awkward position of discouring referrals to agencies endorsed by the Commonwealth.[17]

Requiring that the physician or counselor only inform the woman of the availability of the printed materials,

16. Like this Court in *Akron* and the First Circuit Court of Appeals in *Bellotti*, lower courts have consistently stricken fetal description requirements because of their inflammatory impact. *See Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980); *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 868 (8th Cir. 1981); *Women's Medical Center v. Roberts*, 530 F. Supp. 1136, 1152-54 (D.R.I. 1982); *Leigh v. Olson*, 497 F. Supp. 1340, 1346-47 (D.N.D. 1980).

17. In November, 1982 the Pennsylvania Department of Health developed a list of agencies as required by § 3208. Some of the agencies, such as People Concerned for the Unborn Child in Pittsburgh, Pennsylvania and Citizens Concerned for Human Life in State College, Pennsylvania, are primarily engaged in anti-abortion political activity; other agencies, such as Love the Children in Quakertown, Pennsylvania, a Korean adoption agency, provide no services for pregnant women; still others, such as Birthright, located in many counties of Pennsylvania, provide highly inflammatory and medically inaccurate literature. In at least one instance, the listed "agency," St. Gabriel's Respect Life Group in Drums, Pennsylvania, is the private residence of an individual who is the president of a local chapter of Pennsylvanians for Human Life. Pa. Dept. of Health, Directory of Social Service Organizations As Required By The Abortion Control Act. (Form No. H520.030, Nov. 1982).

rather than forcing her to review them, does not cure these infirmities. Plainly, a woman is likely to review materials recommended to her by her physician or counselor. If she is discouraged from doing so, that will only arouse suspicion and undermine the woman's confidence in her medical advisor. Once the woman chooses to review the materials, the physician or counselor must answer any questions she might have and deal with her reaction, diverting attention from the information relevant to that particular woman. This is a burden that Pennsylvania cannot impose under the guise of informed consent. *Women's Medical Center v. Roberts,* 530 F. Supp. 1136, 1154 (D.R.I. 1982).

The requirements of Section 3205(a) (2) (i) and (ii) that the woman be informed of the "facts" that medical assistance benefits may be available and that the father is liable to assist in the support of her child are also an impermissible attempt to discourage the woman from choosing abortion. Non-medical information of this type, which lies beyond the expertise of the physician or counselor, is, for many women, inappropriate. (J.A. 46a-47a). For a woman carrying a life threatening pregnancy, the availability of medical assistance benefits is not relevant, and a physician giving such information may destroy the physician-patient relationship. Similarly, a victim of rape should not have to hear that an unidentified perpetrator is liable to support her child if she carries the pregnancy to term.

Furthermore, the statute is framed in terms calculated more to confuse than to enlighten. The ultimate realization of the financial support promised by the disclosure is far from a certainty.[18] A woman who elects to carry her preg-

18. A father is "liable" for the support of his child only after legal paternity is established, which may, if contested, take

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nancy to term because she expects to receive such support may be bitterly disappointed if the administrative or legal process fails her.

The coercive impact of the informational requirements in Section 3205(a) (1) is more subtle, but no less real. The requirement that the woman be informed of the particular medical risks associated with the abortion procedure does not permit the physician to refrain from informing the woman of minor or remote risks that confuse or traumatize her. (J.A. 43a). The compelled recitation of "the fact that there may be detrimental physical and psychological affects [to the abortion procedure] which are not accurately foreseeable," § 3205(1)(ii), only compounds the problem. Making this vague and indefinite statement to each and every patient will serve no purpose except to heighten the woman's anxiety about the abortion procedure and to discourage her from having that abortion. (J.A. 43a). Confusing information of this type represents the antithesis of informed consent.[19]

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several years. Even where a woman has obtained a court order of support, enforcement of that order is at best uncertain. Twenty-eight percent of women entitled to child support payments by court order receive no money at all, and those who do, receive an average of only $2,100 per child. *See Child Support Enforcement Legislation, Hearing before the Subcomm. on Public Assistance and Unemployment Compensation of the House Ways and Means Committee,* 98th Cong., 1st Sess. (1983). Moreover, many poor pregnant women are not eligible for medical assistance benefits in Pennsylvania. A woman with one child, earning in excess of $400 per month (47% of the federal poverty level) or a woman with a working spouse is totally excluded from coverage. *See* 62 Pa. Stat. Ann. § 441.1 (Purdon 1985); 55 Pa. Code §§ 171.21, 171.22.

19. Appellants argue that this component of the informational requirements must be found constitutional in light of this Court's summary affirmance in *Planned Parenthood Ass'n v.*

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These requirements are contrary to accepted medical practice and inconsistent with the law of informed consent as it has been adopted and interpreted in Pennsylvania.[20] Like the City of Akron, Pennsylvania "has gone far beyond merely describing the general subject matter relevant to informed consent." *Akron*, 462 U.S. at 445. Section 3205 of the Act "specifies a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." *Id.* Thus, the same inflexibility that condemned the *Akron* ordinance is present in Sections 3205 and 3208.

Appellants argue that the physician or counselor is always free to give information beyond that specifically

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Fitzpatrick, 401 F.Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). That case held the informed consent provision in the 1974 Pennsylvania Abortion Control Act to be constitutional. 35 Pa. Stat. Ann. § 6603 (Purdon 1977). The provision did not contain plainly unconstitutional informational requirements such as those in the Act, nor did it contain physician-only counseling or 24-hour waiting period requirements. Moreover, since 1974, abortion has been one of the most studied medical procedures, and it is doubtful that, today, there are "unforeseen" risks of that procedure. *See* Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Family Planning Perspectives 26 (Jan./Feb. 1984). In any event, the summary affirmance in *Fitzpatrick* preceded this Court's plenary consideration of informed consent statutes in *Akron*, and, inasmuch as that summary affirmance is inconsistent with *Akron*, it must yield. *E.g., Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979).

20. Pennsylvania informed consent law recognizes that the disclosure of minor or remote risks is not required. *See generally Sauro v. Shea*, 257 Pa. Super. 87, 94, 390 A.2d 259, 263 (1978); *Jeffries v. McCague*, 242 Pa. Super. 76, 84-85, 363 A.2d 1167, 1171 (1976); *Cooper v. Roberts*, 220 Pa. Super. 260, 267, 286 A.2d 647, 650-51 (1971). This general standard of informed consent will apply to abortion procedures once § 3205 is stricken.

required in order to tailor the informed consent dialogue to a patient's individual situation. This argument ignores that a physician or counselor cannot possibly provide an adequate explanation of the "unforeseeable" consequences of abortion or undo the harm that may result when he or she provides confusing, irrelevant or psychologically damaging information.

Moreover, this argument fails to account for the enforcement provisions of Section 3205(c) and (d) that strongly encourage, if not compel, the physician or counselor to adhere to the Commonwealth's prescribed litany without deviation. Under subsection (c), a physician who violates the informed consent section is subject to the civil penalty of license suspension or revocation while the counselor who fails to comply is subject to criminal penalties. At the same time, a physician who complies with the informed consent provisions is relieved from civil liability to the patient for failure to give informed consent under subsection (d).

The only sure way to comply with the Act is to present information to the woman in a way that tracks the statutory language precisely, without elaboration, and to disclose every conceivable risk of the abortion procedure. The strong incentives for strict compliance will lead to a rote recitation of the statutory provisions, and women may not obtain additional or specifically tailored information needed to make the abortion decision. As a result, a statute whose ostensible purpose is to protect women's health may become the instrument by which that purpose is defeated.

Finally, appellants argue that this Court should sever any unconstitutional informational requirements and permit the remainder to become effective. Since most of the

requirements are objectionable, the radical surgery necessary to bring Sections 3205 and 3208 within constitutional bounds will result in a section bearing little resemblance to that intended by the Pennsylvania legislature. The reasons that supported this Court's rejection of a similar suggestion in *Akron* apply here. 462 U.S. at 445 n.37. Despite a severablity clause as broad as that in the Act, 462 U.S. at 425 n.8, the Court declined to sever arguably unobjectionable informational requirements because the informed consent section contained the unconstitutional physician-only counseling requirement. Section 3205 not only has a physician-only counseling requirement, but also a mandatory 24-hour waiting period and specific informational requirements that skew the woman's decision. Thus Sections 3205 and 3208 must be enjoined in their entirety.

B. Section 3210(b)'s Choice Of Method And Standard Of Care Requirements Elevate Potential Life Over The Life And Health Of A Woman In Violation Of Her Fundamental Right To Privacy And Are Unconstitutionally Vague.

In 1984, over 59,000 abortions were performed in Pennsylvania. Approximately .1% of these (sixty-nine abortions) were performed after the twentieth week of pregnancy and only .008% (five abortions) were performed after the twenty-fourth week of pregnancy. Addendum at 40a.[21] These statistics do not indicate whether the fetus was viable at the time these abortions were performed; nevertheless, they establish that post-viability abortions occurred rarely in Pennsylvania in 1984.[22]

21. National statistics are in accord. Since 1975, only 1% or fewer of all abortions have been at or after twenty-one weeks gestation and only .01% after twenty-four weeks. *See* Henshaw, *A Portrait of American Women Who Obtain Abortions*, 17 Family Planning Perspectives 90 (Mar./Apr. 1985).

Post-viability abortions are performed for grave and substantial medical reasons. Women suffering from heart disease, kidney disease, eclampsia, cancer or diabetes may require an abortion after the fetus is viable. In addition, a late term abortion may be indicated if the woman discovers through amniocentesis that she is carrying a fetus with severe genetic disorders, such as conjoined twins, thantrophoric dwarfism or anencephalia (lack of brain). Section 3210(a) of the Act prohibits an abortion after the fetus is viable unless necessary to preserve the life or health of the pregnant woman. Consequently, the requirements of Section 3210(b) will come into play only where a physician has determined that the patient's life or health is threatened absent an abortion.

Section 3210(b) of the Act provides two independent requirements for post-viability abortions. First, it compels the exercise of the standard of care that would be required in order to preserve the life and health of any "unborn child" intended to be born and not aborted. Second, the physician must use the abortion method providing the

22. *Roe* placed the point of viability generally at twenty-eight weeks gestation but said it may occur as early as twenty-four weeks. 410 U.S. at 160. Since 1973, medical evidence shows that survival rates for fetuses born at twenty-four weeks have improved. Contrary to the unverifiable evidence offered by some amici, medical literature does not support a finding that the point of viability has moved any earlier than twenty-four weeks. Gilstrap, *Survival and Short-Term Morbidity of the Premature Neonate*, 65 Obstetrics And Gynecology 37 (Jan. 1985); Koops, *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 J. Pediatrics 969 (Dec. 1982); Walker, *Cost-Benefit Analysis of Neonatal Intensive Care for Infants Weighing Less Than 1,000 Grams at Birth*, 74 Pediatrics 20 (July 1984).

best opportunity for the fetus to be "aborted alive" unless that method would present a "significantly greater" medical risk to the life or health of the pregnant woman.[23] Any person failing to comply with either requirement commits a felony of the third degree, which carries a maximum penalty of seven years imprisonment and a fine of $15,000. 18 PA. CONS. STAT. ANN. §§ 1101(2), 1103(3) (Purdon 1983).

Because the choice of method and standard of care prescriptions violate a woman's fundamental right to privacy, and are unconstitutionally vague, the court of appeals' decision that Section 3210(b) is unconstitutional must be affirmed.

1. The choice of method requirement violates the woman's fundamental right to privacy because it fails to make maternal health the physician's paramount consideration.

By compelling the use of the abortion method most likely to result in the fetus being "aborted alive," unless that procedure would result in a "significantly greater" risk to the woman, Section 3210(b) would plainly require in some instances that the physician use a method which

23. In assessing the medical risk to the pregnant woman, the physician is prohibited from considering the potential psychological or emotional impact of the unborn child's survival. The availability of amniocentesis to detect in utero fatal genetic diseases, such as Tay-Sachs, has permitted women that are at risk of bearing children with such diseases to become pregnant, knowing that they can obtain an abortion if amniocentesis shows that the fetus suffers the disease. Because the results from amniocentesis are not available until late in the second trimester of pregnancy, the limitation of § 3210(b) on the physician's ability to consider this aspect of the woman's health may preclude such abortions, thereby forcing women in these circumstances to avoid pregnancy altogether.

is riskier for the woman because it provides a greater chance for fetal survival. Applying the principles of *Roe*, 410 U.S. at 164-65, and *Colautti v. Franklin*, 439 U.S. 379 (1979) ("*Colautti*"), the court of appeals found this section unconstitutional because it impermissibly requires the doctor to "make a trade-off between the woman's health and additional percentage points of fetal survival" and fails to require that maternal health be the physician's paramount consideration. 737 F.2d at 300.

Appellants concede that a state cannot constitutionally compel this trade off; nor do they seriously contend that the term "significantly greater," if given its usual and customary meaning, might prevent the physician from choosing that method of abortion which best serves the medical interests of the woman. Rather, appellants argue that the term "significantly greater" really means a "meaningfully increased" risk, thus eliminating that phrase from the Act. Brief for Appellants at 85. As the court of appeals found, such a construction is "inconsistent with the statutory language and legislative intent reflected in that language." 737 F.2d at 300. Indeed, that construction would also conflict with Pennsylvania's own rules of statutory construction.[24] Therefore, it must be rejected, and Pennsylvania's unconstitutional attempt to elevate potential life over the life and health of women must fall.

24. Those rules require that words and phrases be construed "according to rules of grammar and according to their common and approved usage," and to construe "general words to take their meaning and be restricted by preceding particular words." 1 Pa. Cons. Stat. Ann. § 1903 (Purdon 1985). Pennsylvania law also requires that "every statute shall be construed to give effect to all its provisions." 1 Pa. Cons. Stat. Ann. § 1921 (Purdon 1985).

2. The choice of abortion method prescription is also void for vagueness.

As a matter of due process, a criminal statute is void for vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617 (1954), or is so indefinite that it "encourages arbitrary and erratic arrests and convictions," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). *See generally Grayned v. City of Rockford*, 408 U.S. 104 (1972). The vagueness doctrine applies with especial force where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Colautti*, 439 U.S. at 394; *Grayned v. City of Rockford*, 408 U.S. at 104; *Smith v. Goguen*, 415 U.S. 566 (1974). A statute that "does not afford broad discretion to the physician" but instead, "conditions potential criminal liability on confusing and ambiguous criteria . . . presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Colautti*, 439 U.S. at 394. The choice of method requirement in Section 3210(b) poses these serious problems and is therefore void for vagueness.

A physician attempting to adhere to this requirement faces potential criminal liability conditioned on a series of uncertain judgment calls: The physician must first determine that the fetus is viable; then the physician must choose the abortion method that will provide the best opportunity for the fetus to be "aborted alive" and determine whether this procedure will present a "significently greater" risk to the woman's health than would another method.

The vagueness in the choice of method requirement is apparent when applied to specific conditions that may compel a late term abortion. For example, a diabetic woman at twenty-eight weeks of pregnancy may need an abortion because she is in imminent risk of blindness; or a woman may discover at twenty-six weeks of pregnancy that the fetus is anencephalic. In these circumstances, is the fetus viable? This determination is at best imprecise even when no complications exist, as this Court has recognized. *Roe*, 410 U.S. at 160; *Danforth*, 428 U.S. at 64; *see also Colautti*, 439 U.S. at 388.[25] But here, the difficulty of the viability determination is compounded by the very conditions that may necessitate the abortion. The woman's underlying diabetes may have slowed or advanced the growth of the fetus. There is serious debate in the medical profession whether an anencephalic fetus can ever be found viable because sustained survival is impossible.

Which abortion method is more likely to produce a fetus that will be aborted alive without a significantly greater risk to the woman's health? This too is a difficult decision, far from the simple "everyday task" that appellants maintain is the case. Brief for Appellants at 87-88. The physician can choose one of eight abortion methods.[26]

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25. Even today, where the use of ultrasonography has substantially improved medical practice in this area, doctors can misjudge the weight, length, or gestational age of a fetus by as much as 11 days, Grimes, *Second-Trimester Abortions in the United States*, 16 Family Planning Perspectives 260, 264 (Nov./Dec. 1984), and physicians utilize different standards for determining viability. *Colautti*, 439 U.S. at 396 n.15.

26. These methods are hysterectomy, hysterotomy, oxytocin, instillation of urea, prostaglandin, a combination of urea-prostaglandin or hypertonic saline and dilatation and evacuation ("D&E"). Today, physicians may combine instillation tech-

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Although a physician may know the general risks of a procedure, the patient's underlying medical condition and the manner in which the procedure is performed will cause the specific risks to vary from patient to patient; and because relative risks are just that, the outcome for each woman can never be predicted accurately.

Even a determination based on general risk factors is uncertain. Most physicians would agree that three of these methods (hysterectomy, hysterotomy or oxytocin) would rarely be used given the significantly increased risks to the woman. There would, however, be disagreement over the preferred method of abortion among the remaining techniques.[27] Perhaps the only certainty is that some doctors would find that the methods apparently required by the statute (urea or prostaglandin instillation) are not the methods most likely to be chosen if the doctor were free to exercise his best medical judgment (D&E or a combined urea-prostaglandin instillation).[28]

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niques with instrumental evacuation of the uterus and call the entire procedure a D&E. Urea, prostaglandin and saline abortions are used less and less because some physicians consider these methods to be more dangerous to the woman than the D&E method or the combined urea-prostaglandin instillation. The hysterectomy and hysterotomy are today almost never used because current research has shown these procedures to be almost 100 times more dangerous to the pregnant woman than any other method of abortion. See Grimes, *supra* n.25.

27. There are contraindications for each of the instillation methods. For example, contraindications for the use of saline include: sickel-cell anemia, cardiac insufficiency, renal disease and hypertension. Kerengy, *Hypertonic Saline, Instillation* Second-Trimester Abortion 79, 83 (Berger ed. 1981). Contraindications for prostaglandin abortions include asthma, pulmonary hypertension, glaucoma, epilepsy or hypertensive disease. Hern, Abortion Practice 125 (1984).

28. For highly skilled physicians, D&E is clearly the preferred method for it is quicker than the other methods, reduces the

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To confuse matters further, the Act contains no definition of "aborted alive" and the definition of "born alive", contained in Section 3203 of the Act is different from the medical definition.[29] Like the assessment of viability, the prediction of whether the fetus will be "aborted alive" is always uncertain and can vary depending upon the condition of the fetus and the manner in which the abortion is performed.[30] Since late term abortion techniques have changed considerably within the last few years and no reliable data exist on late term abortion methods or the frequency of live births[31] the relative risks of producing a live born fetus are indeterminable.

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woman's susceptibility to infection and does not require her to experience labor. For other physicians, urea-prostaglandin is the method of choice because it is faster than use of urea or prostaglandin alone, and thus decreases the risk of insulin shock or diabetic acidosis, which can lead to coma or death.

29. The medical definition of "live born infant" is:

> A fetus, irrespective of its gestational age, that after complete expulsion or extraction from the mother shows evidence of life—that is, heartbeats or respirations. *Heartbeats are to be distinguished from several transient cardiac contractions; respirations are to be distinguished from fleeting respiratory efforts or gasps. . . .*

American College of Obstetricians and Gynecologists, Committee on Terminology, *Obstetric-Gynecologic Terminology* 454 (Hughes ed. 1972) (emphasis added).

30. For example, some physicians will never consider an anencephalic fetus viable at 26 weeks, although they might determine that the same fetus could be "born alive" as defined in § 3203. Other physicians could consider this fetus viable, but not likely to be "aborted alive" except by use of hysterotomy or hysterectomy, which carry a much higher risk to the woman.

31. Neither the National Center for Health Statistics nor the Centers for Disease Control collect statistics on the frequency of live births following abortions. Research shows, however, that the probability of live birth has most likely declined in the past decade because women are obtaining abortions at progressively earlier gestational ages, the use of ultrasonography to con-

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In the face of such uncertainty and the potential for criminal liability, the statute as drafted will chill physicians from performing necessary abortions late in pregnancy. For the brave few who will continue to perform these procedures, the statute will encourage physicians to minimize women's health problems and to choose the method most likely to produce live birth, because this choice avoids liability under the statute.[32]

The Commonwealth cannot use the coercive power of criminal liability to force physicians to choose an abortion method that may increase the threat to the patient's life or health, particularly not in the vague terms employed in Section 3210(b). "[W]here conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Colautti*, 439 U.S. at 400-01. Moreover, the decision whether a woman is willing to subject herself to an increased chance of certain disabling conditions, or even death, in order to increase the likelihood of a live birth is a question better answered

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firm gestational age has become more widespread, and the use of hysterotomy, hysterectomy, urea and prostaglandin instillation techniques, which are more likely to produce a live birth have declined because they are more hazardous to women's health. *See* Grimes, *supra* n.25.

32. To confuse things further, it is never entirely clear whether the chosen procedure constitutes an abortion as defined by § 3203 of the Act, a definition inconsistent with the accepted medical definition of abortion. *See* Williams Obstetrics 447 (17th ed. 1985). The definition of abortion in the Act turns on the doctor's intent and the means used to complete the medical procedure. Ironically, a physician performing a hysterotomy or induction by oxytocin with intent to produce a live born fetus, may not be performing an abortion, while a physician performing a Caesarian section on a weak, full-term fetus, with knowledge that the fetus may not survive the delivery, could be performing an abortion.

in the context of the physician-patient relationship, in light of all factors relevant to that woman, most especially her health.

3. The standard of care prescription fails to contain an exception for the woman's life or health and fails to specify that the physician's subjective judgment is controlling.

Section 3210(b) also requires the physician to exercise the standard of care for post-viability abortions that would apply in order to preserve the life and health of any "unborn child" intended to be born. The standard of care language suffers the same vagueness problems as the statute at issue in *Colautti* and is therefore unconstitutional.

Neither Section 3210(b) nor the other provisions of the Act specify particular actions that a physician must take in order to meet the standard of care and, for that reason alone, the provision may be unconstitutionally vague. At a minimum, current medical literature indicates that some physicians might read this section as requiring them to administer steroids to improve respiratory function of the fetus, *see* Bishop, *Acceleration of Fetal Pulmonary Maturity*, 58 Obstetrics and Gynecology 48s (Supp. Nov. 1981), or to insert a shunt into a hydrocephalic fetus to enhance the likelihood of survival. *See* Clewell, *A Surgical Approach to the Treatment of Fetal Hydrocephalus*, 306 N. Eng. J. Med. 1320 (June 1982). The statute may also require a physician to delay the termination of a pregnancy longer than would be warranted if the health of the woman were the only concern.

The standard of care requirement does not contain an exception that would allow physicians to forego extra-

ordinary efforts on behalf of the fetus where those efforts might jeopardize the woman's health or life. Particularly where the medical practice is contraindicated because of the presence of complications,[33] the lack of a maternal life or health exception could require physicians to violate their paramount duty to their patients. As in *Colautti:*

> The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures.

Colautti, 439 U.S. at 400.

Moreover, it is unclear whether the prescribed standard of care imports a clearly subjective standard or whether it imposes a mixed subjective and objective standard. As the Court found in *Colautti*:

> The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center.

439 U.S. at 391-92. Accordingly, Section 3210(b) does not meet constitutional standards, and the court of appeals' decision must be affirmed.

C. The Requirement That A Second Physician Be Present At A Post-Viability Abortion Is Unconstitutional Because It Lacks A Clear Exception For Medical Emergencies.

33. For example, administration of steroids is contraindicated where there is a need for immediate delivery, or in cases of maternal infection, maternal diabetes or maternal hypertension. *Acceleration of Fetal Pulmonary Maturity, supra* p. 33 at 505.

Section 3210(c) of the Act requires the attendance of a second physician for post-viability abortions unless there is no possibility of fetal survival. In *Ashcroft,* six justices of this Court concluded that a similar second-doctor requirement could not withstand constitutional scrutiny absent an exception for medical emergencies in which waiting for a second physician may endanger the woman's health. 462 U.S. at 485 n.8 (opinion of Powell, J.), 501-03 opinion of Blackmun, J.). Since post-viability abortions are performed when the woman is suffering from grave medical conditions, the need for emergency medical care is not only forseeable, but likely. The absence of this exception is therefore more than a minor flaw in the drafting of the statute.

Appellants concede that a medical emergency exception to Section 3210(c) is constitutionally mandated, but they contend that such an exception exists in Section 3210(a) which provides in pertinent part:

> It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment . . . that the abortion was necessary to preserve maternal life or health.

The court of appeals correctly concluded that this language only protects the physician against a charge that the post-viability abortion was unlawful and does not provide a medical emergency exception to the second-doctor requirement, found in a separate subsection.

Moreover, reading this language to provide a medical emergency exception cannot be squared with the remainder of the Act, which, in five separate provisions, contains express exceptions for a medical emergency, as narrowly de-

fined in Section 3203.[34] Obviously, the Pennsylvania General Assembly knew how to provide for a medical emergency exception, and its failure to do so in Section 3210(c) must have been intentional. Therefore, the court of appeals' holding that this section does not meet constitutional standards must be affirmed.

D. The Reporting Requirements Enjoined By The Court Of Appeals Exceed Constitutional Limitations As Defined In Danforth.

Since 1974, Pennsylvania has been gathering aggregate statistical information each calendar quarter from abortion facilities. 35 PA. STAT. ANN. § 6606(e) (Purdon 1977) (repealed); 18 PA. CONS. STAT. ANN. § 3214(f) (Purdon 1983). Each year, the Department of Health combines this statistical information into a single report made available to the public. *See, e.g.*, Addendum at 37a-42a.

The forms used for these reports identify each facility making the report. However, as the district court found in June of this year:

> [I]t was the policy of the Department of Health of the Commonwealth of Pennsylvania to separate abortion records submitted by each facility licensed in the Commonwealth from the coversheet which identified the facility. This policy was "to avoid the possibility that certain facilities and physicians could be pressured and possibly harassed by members of the public objecting to the medical abortion practice." Plaintiffs' Exhibit 7. It was the position of the Department of Health "that patient care may suffer if physicians or abortions [sic] clinics are under harassment . . ." *Id.*

34. A medical emergency exception is expressly provided in: the private medical consultation requirement (§ 3204), the informed consent requirements (§ 3205), the parental-judicial consent requirements (§ 3206), the post-first trimester hospitalization requirement (§ 3209) and the requirement that no public official issue any order requiring an abortion without the express voluntary consent of the woman (§ 3215(f)).

Addendum at 3a-4a.[35]

In a dramatic departure from prior Pennsylvania law, numerous provisions of the Act require physicians, hospitals or clinics to furnish at least six separate reports to the Commonwealth providing an extraordinary amount of detailed information. All but two of these reports must be made available for public inspection and copying. §§ 3207(b), 3214(a),(e)(2),(f),(h).[36] For example, Section

35. This policy of gathering significant health statistics while at the same time preserving necessary confidentiality is entirely consistent with the practice of federal agencies that collect similar information. The National Center for Health Statistics has concluded:

> The Report of Induced Termination of Pregnancy is designed to collect information for statistical and research purposes only. These reports are not maintained permanently in the official files of the State health department. The data that are gathered from these reports will be presented in aggregate rather than individual form.
>
> Hospitals, clinics, and physicians are assured that extensive legal and administrative measures are used to protect individuals from unauthorized disclosure of personal information contained on the reporting form.

National Center for Health Statistics, *Handbook on the Reporting of Induced Termination of Pregnancy*, DHEW Publication No. (PHS) 79-1117 at 4 (1979).

36. The individual maternal death report, enjoined by the court of appeals, is not subject to public disclosure, although a statistical report drawn from the individual reports is to be made publicly available. § 3214(g). This report is nevertheless objectionable because it requires physicians to report maternal deaths in a manner inconsistent with accepted medical standards, the purpose being only to inflate the number of deaths due to abortion so as to discourage the abortion choice. For example, maternal death following an abortion that was not completed due to an ectopic pregnancy is to be included as an incident of maternal death arising from induced abortion even though the actual cause of death was the ectopic pregnancy. The only other report not available to the public is the pathological report in § 3214(c), (d) that was not enjoined below.

3214(a) requires that an individual report be filed for each abortion setting forth 14 categories of information including the physician's or clinic's name, the woman's age, race, marital status, residence and prior pregnancies, "the length and weight of the aborted unborn child when measurable" and the method of payment for the abortion.

The court of appeals enjoined the collection of the individual abortion report as well as the individual complication report, § 3214(h), the report of maternal death, § 3214(g), and the report on the determination of viability, § 3211(a).[37] It did not, however, enjoin the sections requiring facility identification reports, § 3207(b), quarterly statistical reports, § 3214(f), or reports of pathological examinations, § 3214(c),(d).

After remand to the district court, appellees sought a preliminary injunction against the requirement that the facility identification report and the quarterly statistical report be made available for public inspection and copying. On June 17, 1985, after a full evidentiary hearing, the district court entered an order, with extensive findings of fact and conclusions of law, preliminarily enjoining the enforcement of these public disclosure requirements. Addendum at 1a-37a.

The record showed a broad-based, intensive and continuous pattern of violence and harassment directed

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37. Contrary to appellants' contention, appellees raised the issue of the constitutionality of the physician's report on viability required by §3211(a) before the court of appeals. Section 3214(a)(8) provides that "the information required to be reported under § 3211(a) (relating to viability)" is to be included in the individual abortion report. Appellees' general challenge to the individual abortion report necessarily subsumes a challenge to the specific pieces of information to be included in that report.

against the patients and staff members of abortion clinics. Addendum at 5a-15a. The district court concluded that this pattern of violence and harassment would be increased by the public disclosure of facility names and quarterly statistical reports. In addition, public disclosure would impose a burden on a woman's right to choose an abortion by heightening her fear and anxiety and by discouraging physicians from offering abortions to avoid pressure from anti-abortion forces. In light of these recent findings of the district court in this case, and this Court's decisions in Danforth and Akron, the decision of the court of appeals enjoining these reporting requirements must be affirmed.

The statute in *Danforth* required facilities to maintain forms promulgated by state health officials "the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data." 428 U.S. at 87. The information and reports were to be used "only for statistical purposes." *Id.* On the strength of the district court's conclusion that these record keeping requirements were "essential to the advancement of medical knowledge," the Court found that, "while perhaps approaching impermissible limits," the requirements were constitutional. Central to this conclusion was the statutory requirement that the records be maintained in confidence, with the sole exception of public health officers. *Id.* at 80-81.

In *Akron*, the Court explained its holding in *Danforth*:

> In *Danforth, supra*, we unanimously upheld two Missouri statutory provisions, applicable to the first trimester, requiring the woman to provide her informed written consent to the abortion and the physician to keep certain records, even though comparable require-

ments were not imposed on most other medical procedures. *See* 428 U.S., at 65-67, 79-81. The decisive factor was that *the State met its burden of demonstrating that these regulations furthered important health-re'ated state concerns.* But even these minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth. *See id.*, at 81.

462 U.S. at 430 (emphasis added).

The elements that were essential to the holding in *Danforth* are not present here. There is no evidence of "important health-related concerns" furthered by the reports at issue; appellants have asserted nothing more than a general interest in maternal health to justify these onerous reporting requirements.[38] The mere assertion of that interest, however, is not sufficient to support reporting requirements like these, that have a significant impact on the abortion decision, that radically depart from accepted health reporting standards,[39] and that go far

38. Indeed, when forced to justify the extraordinary burden of public disclosure before the district court, appellants offered the novel, and wholly unfounded, argument that such disclosure would enhance and facilitate the exercise of First Amendment rights of opponents of abortion. The district court resoundingly rejected this proffered justification. Addendum at 30a-32a.

39. Appellants contend that the information required in the individual abortion reports is similar to that compiled by the Centers for Disease Control. However, a comparison of § 3214 (a) with the information reported by the CDC in its surveillance reports reveals that only seven of the fourteen categories in the statute are reported by the CDC. In any event, the CDC gathers this data in aggregated form, primarily from central health

(Continued on next page)

beyond those found acceptable in *Danforth*.[40]

Moreover, the reporting scheme here poses a far more serious threat to the abortion right than the record keeping requirement in *Danforth*. The required reports are extremely detailed and must be filed with the Commonwealth for each abortion, or each occurrence of complications or maternal death. Unlike reports made to any other state or federal health agency, the reports themselves are not confidential, and there is absolutely no limitation on the use to which the Commonwealth or the members of the public who obtain these reports can put them.

The combination of individual, detailed reports and mandated public disclosure of those reports renders the enjoined reporting requirements particularly sinister. The decision to terminate a pregnancy is a highly personal and intensely private one that must be protected from interference. Such protection compels absolute anonymity for the woman who elects an abortion, as this Court recognizes by permitting women who challenge abortion statutes to proceed by use of pseudonym. *E.g., Roe*; *Doe v. Bolton*, 410 U.S. 179 (1973). As Justice Stevens so cogently remarked in *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) ("*Bellotti II*"):

(Continued from previous page)

agencies of each state, and it does not receive individual abortion reports. See Centers for Disease Control: *Abortion Surveillance 1979-1980* at 2 (1983).

40. The record before the court of appeals established that the reporting requirements in the Pennsylvania Act will increase the cost of abortion to an unspecified extent. Appellants argue that this cost will surely be less than the cost of the pathological examinations sustained in *Ashcroft*. This argument misses the mark. When statutorily imposed requirements increase the cost of abortions, the extent of the increase must be balanced against the specific health benefits that flow from the increase. *Ashcroft*, 462 U.S. at 488-90 (opinion of Powell, J.) Appellants have established no such specific benefits to

(Continued on next page)

> It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.

Compelled disclosure can unconstitutionally chill the exercise of fundamental rights, particularly when the disclosed activity is unpopular or controversial. *E.g., Brown v. Socialists Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 449 (1958).

Given the recent history of violence directed against abortion providers and women seeking abortions, many physicians will be reluctant to provide this medical service unless they can protect their identity from public disclosure. Moreover, a woman will necessarily be more afraid to choose an abortion if there exists any possibility that her choice would become publicly known. Yet this is precisely the possibility that would result from the compelled submission and public disclosure of the detailed reports required by the Act.[41]

(Continued from previous page)

justify any increased cost that reporting requirements would impose.

41. While the statute does not require the reporting of the woman's name, the amount of information about the woman and the circumstances under which she had an abortion in the report is so great that the possibility of identification by piecing together the information is far from remote. Publication of the fact that a 32-year old, married, Asian woman, residing in a particular small town, who had three prior pregnancies, obtained an abortion on a given date at a particular facility could be tantamount to publishing that woman's name. Vigilant opponents of abortion could combine this data with other readily available information, such as census data. Moreover, while the physician's name is to be deleted from the public copy of the report, the name of the facility is not, and as defined by the Act facility includes individual physiciants' offices. Every physician who performs early abortions in his office will be exposed just as surely as if his name were not deleted. This is the type of provider most likely to withdraw from abortion practice if subject to violence or harassment. Addendum at 25a-28a.

The burdens that would be imposed are severe. They not only increase the cost of an abortion but also threaten the exercise of a woman's fundamental right to choose an abortion, and they can lay claim to no firm justification in public health. The court of appeals properly enjoined these reporting requirements. Its decision should be affirmed.

E. The Promulgation Of Rules Governing Judicial Authorization Proceedings Has Rendered The Court Of Appeals' Decision Moot; The Question Of The Validity Of The New Rules Should Be Addressed First By The District Court.

Section 3206 of the Act requires a physician to obtain parental consent or judicial authorization prior to the performance of an abortion on any woman under the age of 18 or any incompetent woman. Although requested to do so, the court of appeals did not invalidate the parental-judicial consent provisions of the Act,[42] finding that the statute met the constitutional standards set forth in *Akron*, 462 U.S. at 439-42, and *Ashcroft*, 462 U.S. at 490-93. The court held, however, that because

> the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form . . . [the operation of Section 3206] is enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action, if still pending, or in some future action, that the regulations are unconstitutional.

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42. This portion of the court of appeals' decision is not before this Court. Appellees reserve their right to present additional evidence in support of their position after remand to the district court.

737 F.2d at 297; *see Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1008-09 (1st Cir. 1981).

In November, 1384, after this appeal was docketed, the Pennsylvania Supreme Court promulgated rules for judicial authorization proceedings under Section 3206. Pennsylvania Orphan's Court Rule 16, 14 Pa. Bull. 4503 (Dec. 15, 1984). Because the absence of rules was the underlying basis for the court of appeals' injunction, their promulgation has rendered the appeal moot. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). Since "the exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy," and the "controversy must be extant at all stages of review, not merely at the time the complaint is filed," *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (*quoting Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)), this Court should dismiss this portion of the appeal and remand the matter for further proceedings. *See also Roe*, 410 U.S. at 125.

The constitutionality of the rules as promulgated must be determined before the Commonwealth can enforce the provisions of Section 3206. Initial consideration of this matter should be made by the district court, rather than this Court, since the parties have had no opportunity to develop a factual record, and this Court does not have the benefit of lower court assessment of the issues. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 52-53 (1980); *Fusari v. Steinberg*, 419 U.S. 379, 386-90 (1975); *Differderfer v. Central Baptist Church, Inc.*, 404 U.S. 412, 415 (1972).

F. The Rules Promulgated By The Pennsylvania Supreme Court Do Not Provide For A Constitutional Judicial Authorization Procedure.

If the Court does consider the constitutionality of the rules that implement Section 3206, then they must be en-

joined since they are facially unconstitutional. In Pennsylvania last year, over 7,000 minor women obtained abortions. The vast majority of these women, 89.9%, were older teenagers aged fifteen to seventeen, capable of making their own decisions regarding abortions. Addendum at 39a. Moreover, parents are involved in their daughter's abortion decision in most cases, especially when the minor is age 14 or below.[43]

Although in a perfect world, all parents and their teenage daughters would communicate with each other about decisions as important as abortion, this is not always possible. Indeed, parental involvement in the abortion decision may in some cases cause tensions and emotional strain and create long-term problems in inter-family relationships. (R., Stipulation of Uncontested Facts, ¶¶ 145, 146). Parents who are told of the pregnancy may become upset and abusive, and may attempt to influence their daughter to carry the pregnancy to term, without regard to her best interests. (*Id.*, ¶¶ 149, 150). In some cases, minors may be rejected, lose financial support or be disowned if there is parental involvement. (*Id.*, ¶ 150). *See also* Donavan, *supra* n.43, at 262.

Recognizing the risks of forced parental involvement in the abortion decision, this Court has required that states provide an independent judicial alternative "whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, de-

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43. See Donavan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Family Planning Perspectives 259, 261 (Nov./Dec. 1983); Torres, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Family Planning Perspectives 284, 287 (Nov./Dec. 1980).

spite her immaturity, an abortion would be in her best interests." *Akron*, 462 U.S. at 439-40; *Ashcroft*, 462 U.S. at 491; *Bellotti II*, 443 U.S. at 643-44. This judicial proceeding must assure that resolution of the issue, and any appeals that follow, will be completed with anonymity and sufficient expedition, and must provide the minor with an effective opportunity for an abortion to be obtained. *Bellotti II*, 443 U.S. at 644. The newly promulgated rules fail to meet these requirements.

Unlike the statute in *Ashcroft*,[44] Pennsylvania Orphan's Court Rule 16.4 gives the applicant's "parents or persons standing in loco parentis" an absolute right to attend the hearing, even if parental involvement is contrary to the minor's best interests. This unavoidable parental participation is plainly unconstitutional. A mature minor "is entitled to make her abortion decision *independently*," *Bellotti II*, 443 U.S. at 650 (emphasis added), and a minor for whom an abortion is in her best interest "is entitled to court authorization *without any parental involvement*." *Id.* at 648 (emphasis added); *see also Akron*, 462 U.S. at 441 n.31.[45]

The rules allow up to twenty-three days (seventeen business days) within which to complete any appeal from a denial of a minor's application. This three-week period is excessive in light of the critical need for expedition to satisfy constitutional standards, *Ashcroft*, 462 U.S. at 491

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44. Mo. Ann. Stat. § 188.028 (Vernon).

45. Neither § 3206 nor the rules require parental notification that a petition has been filed. Nevertheless, parents may learn of their daughter's decision to petition the court, particularly when the minor has already sought her parents' consent for an abortion, but that consent has been withheld.

n.16; *Bellotti II*, 443 U.S. at 644, and to protect the best medical interests of minors seeking abortions.[46]

Rule 16.3 requires that the court provide counsel to a minor upon her request. If the minor fails to request counsel, the court is not required to assess her maturity to make that decision or to appoint counsel when it is in the minor's best interests.[47] In *Ashcroft*, this Court emphasized that the judicial authorization procedure must provide a minor with "an effective opportunity for an abortion to be obtained." 462 U.S. at 491 n.16 (citation omitted). Given the "unique nature of the abortion decision," *Bellotti II*, 443 U.S. at 642, and the fact that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible," *id.*, a procedure that fails to provide for the appointment of counsel when in a minor's best interests falls short of constitutional standards. *See Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); *Wynn v. Carey*, 582 F.2d 1375, 1389 n.28 (7th Cir. 1978).

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46. Each week of delay in performing an abortion increases the complication rate by 15 to 30% and the death rate by 50%. Delay is particularly acute for minors, who are more likely than older women to seek abortion at later weeks of gestation, when the safest and least expensive methods of abortion can no longer be utilized. (R., Stipulation of Uncontested Facts ¶¶ 89, 157, 168-81); *see also* Grimes, *supra* n.25.

47. By contrast, the statute in *Ashcroft* contained an explicit provision mandating appointment of counsel in all cases where the minor does not have private counsel. Mo. Ann. Stat. § 188.028 2(3) (Vernon).

Rule 16.3 also accords too much discretion in the appointment of a guardian ad litem.[48] In representing an incompetent or minor's best interests, a guardian ad litem is empowered to substitute his or her judgment for that of the minor. In those limited instances where a minor is immature and unable to articulate why an abortion is in her best interest, the appointment of a guardian ad litem may be appropriate. However, in cases that involve a mature minor, the appointment of a guardian ad litem conflicts with the constitutional right of the minor to decide for herself whether to have the abortion. Thus, appointment of a guardian ad litem without carefully circumscribed duties threatens the possibility of a third party exercising an arbitrary veto over the minor's decision, contrary to *Danforth*. 428 U.S. at 74.

Given these constitutional infirmities in the rules, the decision of the court of appeals to enjoin Section 3206 until their promulgation and review by the district court was well justified.

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48. By contrast, the statute in *Ashcroft* specified when a guardian ad litem should be appointed and the role of the guardian ad litem:

> In any case where there exists the potential or appearances of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interests. The court shall set forth, for the record, the grounds for such appointment.

Mo. Ann. Stat. § 188.028 2(2) (Vernon).

CONCLUSION

This Court should dismiss the appeal for want of finality, consider the appeal papers as a petition for writ of certiorari and deny that petition. Alternatively, if the Court does not dismiss the appeal, the decision of the United States Court of Appeals for the Third Circuit from which the appeal is taken should be affirmed.

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 82-4336

AMERICAN COLLEGE OF OBSTETRICIANS
AND GYNECOLOGISTS, PENNSYLVANIA
SECTION, et al.

v.

RICHARD THORNBURGH, et al.

FINDINGS OF FACT, DISCUSSION,
CONCLUSIONS OF LAW, AND ORDER

HUYETT, J. June 17, 1985

Presently pending before me is the issue of whether or not to enjoin the Commonwealth of Pennsylvania from enforcing the public disclosure requirements of sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act. In order to place the present issues in context, it is first necessary to review the history of this case, a case which has evolved into a procedural morass.

The Pennsylvania Abortion Control Act was enacted on June 11, 1982 and was scheduled to become effective 180 days thereafter. In October, 1982, plaintiffs filed their complaint and on October 29, 1982, they filed a motion for preliminary injunction. After a hearing on December 2, 1982 and after considering the parties' extensive stipulation of facts, their proposed findings of facts and conclusions of law and memoranda of law, I issued an order on December 7, 1982 granting a preliminary injunction as to § 3205 of the Act and denying plaintiffs' motion for a preliminary injunction as to the remainder of the Act.

Plaintiffs immediately filed a notice of appeal and the Commonwealth cross-appealed as to the twenty-four hour waiting period of section 3205. On December 9, 1982, the Third Circuit granted plaintiffs' request for a stay of enforcement of the Act pending the appeal. After briefing and oral argument, the Third Circuit ordered the case held pending Supreme Court decisions in three then-pending abortion cases. After the Supreme Court decisions were issued, the Third Circuit requested additional briefing, heard reargument, and on May 31, 1984 filed its opinion.

Defendants thereafter filed an appeal to the Supreme Court pursuant to 28 U.S. § 1254(2), challenging the Third Circuits' holding certain sections of the Act unconstitutional. The Supreme Court has recently stated that it will hear oral arguments in this case next term although the Court did not note jurisdiction. 53 U.S.L.W. 3739 (1985).

In the meantime, defendants filed a motion on July 20, 1984 to stay proceedings in this court pending the outcome of the appeal before the Supreme Court. Plaintiffs stated that they would not object to the stay of proceedings if the reports required by sections 3207(b) and 3214(f) were maintained confidentially, *i.e.* if the enforcement of the disclosure provisions of §§ 3207(b) and 3214(f) were enjoined. By order dated September 13, 1984, I granted defendants' motion for a stay with the proviso that any reports filed pursuant to sections 3207(b) and 3214(f) would be mantained in confidence by the Commonwealth and would not be made available for public inspection pending an early hearing on these matters. On February 7, 1985, a hearing was held at which plaintiffs presented the testimony of several witnesses and documentary evidence; the defendants introduced several documents. After the hearing I requested additional briefing on several issues and then held oral argument on April 11, 1985.

The following constitute my findings of fact, discussion, and conclusions of law for purposes of a preliminary injunction.

FINDINGS OF FACT

1. The total number of abortions performed in Pennsylvania from January 1 to December 31, 1983 and reported to the Pennsylvania Department of Health was 59,288.

2. Of the 59,288, 70.3 percent (41,656) were performed in free-standing clinics; 25.6 percent (15,176) were performed in hospitals, and 4.1 percent (2,456) were performed in doctors' offices.

3. In a letter dated March 12, 1979 and addressed to Senator Henry Messinger, Dr. Frank Weaver, D.O.F.A.C.O.O.G., stated that he felt harassed by having his name revealed pursuant to the Right-to-Know statute as that of a doctor who performed abortions. He suggested that one alternative for him might be to cease providing this service. Plaintiffs' Exhibit 2.

4. Prior to the enactment of the Abortion Control Act of 1982, it was the policy of the Department of Health of the Commonwealth of Pennsylvania to separate abortion records submitted by each facility licensed in the Commonwealth from the cover sheet which identified the facility. This policy was "to avoid the possibility that certain facilities and physicians could be pressured and

possibly harassed by members of the public objecting to the medical abortion practice." Plaintiffs' Exhibit 7. It was the position of the Department of Health "that patient care may suffer if physicians or abortions clinics are under harassment. . ." *Id.*

5. The Pennsylvania Abortion Control Act became law on June 11, 1982 and was scheduled to go into effect 180 days thereafter.

6. Section 3207(b) states

Reports—Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, which shall be open to public inspection and copying, containing the following information:

(1) Name and address of the facility.

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof. 18 Pa. Cons. Stat. Ann. § 3207(b).

7. Section 3214(f) states

Report by facility—Every facility in which an abortion is performed within the Commonwealth during any

quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during the quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. These reports shall be available for public inspection and copying. 18 Pa. Cons. Stat. Ann. § 3214(f).

8. Section 3202(d) states

Right of conscience—It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liabilty or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions. 18 Pa. Cons. Stat. Ann. § 3203(d).

9. The Bureau of Alcohol, Firearms and Tobacco investigated 30 bombings of abortion clinics and counselling centers in the years 1982, 1983, and 1984, twenty-four of which occurred in 1984. Plaintiff's Exhibit 9.

10. In a statement on January 3, 1985, President Reagan condemned the bombings of abortion clinics as violent, anarchist activities and directed the Justice Department to step-up its investigation of the attacks. Plaintiff's Exhibit 8.

11. Margaret K. Ross, Director of Educational Programs at Hillcrest Women's Medical Centers testified at the hearing on February 7, 1985. Ms. Ross testified in a candid, forthright manner and I found her to be a credible witness.

12. Hillcrest operates five medical facilities, two in the District of Columbia; one in Baltimore, Maryland; one in York, Pennsylvania, and one in Harrisburg, Pennsylvania. Tr. 12.

13. In the past year, the frequency of demonstrations at the Harrisburg Hillcrest Center has escalated as has the telephone harassment of the clinic. Telephone harassment includes calls to schedule bogus appointments. Tr. 15-16.

14. Security at the Harrisburg Hillcrest Center has been increased at the expense of the clinic. Tr. 17.

15. The York Hillcrest clinic opened on August 29, 1984. Protests were held that date both in front and behind the facility by pro-life groups. A group of people numbering approximately 150 paraded up and down the sidewalk and at times remained stationary blocking the entrance to the clinic. Tr. 20-22.

16. From nine to fourteen people were in the back of the building throughout the day on August 29 and would yell at cars entering and leaving the parking lot as well as try to prevent the cars from moving. Tr. 23-24.

17. On September 8, 1984, the protest outside the York Hillcrest clinic was repeated. A cameraman with an instacamera from WGCB-TV Channel 49 filmed events

throughout the day and in particular focused the camera on persons entering and leaving the clinic. Tr. 26.

18. On September 8, 1984, a crowd at the back of the clinic harassed a young woman and two of her friends as they exited the clinic. The young woman had just had an abortion during which she had had an IV sedation. The crowd taunted the three women as they got into a car. The driver of the car hooked bumpers with another parked car which simply fueled the crowd to make comments such as "It looks pretty bad, but it's not as bad as what you just did in there." At this point, the patient got out of the car and tried manually to unhook the bumpers threatening physical injury to herself. Throughout this period, she was crying and becoming increasingly upset. Tr. 30-31.

19. On that same day, Ms. Ross had to go to a shopping center and pick up a prospective patient and her parents because they did not want to be identified by any community members because they feared reprisal. Tr. 34.

20. The York Hillcrest clinic has escalated its security by installing infrared eyes and on occasion hiring an armed private security guard. Tr. 35.

21. On November 2, 1984, the Court of Common Pleas for York County granted a temporary injunction against the protestors at the request of the York Hillcrest Center limiting the number of protestors at the clinic to five known persons. Tr. 35-36.

22. On November 3, 1984, the protestors violated the terms of the injunction by appearing in large numbers at the clinic and resuming their previous protest. The York

Police, who were apprised of the situation told Ms. Ross that the temporary injunction was unenforceable. Tr. 37.

23. On January 1, 1985, the Hillcrest clinic in southwest Washington, D.C. was bombed. Tr. 38.

24. After that incident, at least one physician who performed abortions at the York Hillcrest Center refused to continue to perform procedures at the clinic for fear that the Clinic would be bombed. Two other physicians who perform abortions at the Harrisburg Hillcrest Center have refused to travel to the York Hillcrest Center out of fear of public reprisal and personal injury. Tr. 38-39.

25. The Hillcrest Women's Medical Centers advertise their services through the yellow pages of the telephone directory, through mailings of brochures to schools, referral agencies, and physicians. Prior to the opening of the York clinic, press statements were released to the effect that abortion services would be provided. Tr. 40-41.

26. Mary Banecker testified at the hearing on February 7, 1985 and because she testified in a candid and straightforward manner, I found her to be a credible witness.

27. Ms. Banecker is an administrator at the Northeast Women's Center in Northeast Philadelphia. Northeast provides abortion services along with other gynecological services. Tr. 52.

28. Protests have been held outside the clinic on the public sidewalk almost every Saturday since May, 1981. Tr. 53.

29. Since November 1984, the character of these protests has changed and become more intense. More people

are involved and they yell at the staff members by name, calling them murderers and mercenaries.

30. Prior to November 1984, protests included protestors yelling at patients comments like "They're going to rip your baby's arms off. They're going to suck your baby's eyes out," causing patients to enter the clinic in tears. Tr. 57-8.

31. Protestors also distributed literature which contained pictures of aborted fetuses to persons entering and leaving the building in which the clinic is located. Plaintiff's Exhibits 10 and 11.

32. On the Saturday before Thanksgiving 1984, three people went to the clinic waiting room and started to distribute literature to persons sitting in the room. After they were told that they were trespjassing, they slowly left the building. Tr. 60.

33. On December 8, 1984, there was another incident inside the clinic. About 50 people stormed into the clinic building and upstairs into the clinic. Several protestors pushed their way through to the recovery room where they scattered pro-life literature and put stickers reflecting a fetus on the sheets under the pillows and on a number of supply items. Tr. 63.

34. Despite several requests by clinic staff members for the protestors to leave, they remained stationary while some sang. Tr. 64.

35. One lab technician, Maryann Cass, was injured when some of the protestors tried to get into the lab where she was taking blood. She had been repeatedly hit by the door which she tried to keep closed and sustained injuries

to her legs and back which caused her to miss two weeks of work. Tr. 64-65.

36. When the police arrived, the demonstrators continued to refuse to leave. After a final warning, the police started physically removing protestors from the clinic and placing them under arrest. Ultimately 31 persons were arrested. Tr. 65-66.

37. In the summer of 1983, the Northeast Center obtained an injunction from Judge Takiff of the Court of Common Pleas for Philadelphia enjoining pickets of more than six persons at a time and enjoining any abusive threats aimed at persons entering or leaving the clinic. Plaintiff's Exhibit 12.

38. The protestors continually violated the injunction. Northeast contacted the Sheriff's Office to enforce the injunction and paid an officer time and one-half to do so. Tr. 69.

39. The Sheriff however merely monitored the situation and never took any affirmative action to enforce the injunction. Tr. 69.

40. Pro-life protestors picketed the home of Ms. Banecker one week before the February 7, 1985 hearing carrying signs which read "Banecker's business is to butcher babies for big bucks" and "Mary Banecker, Hitler would be proud of you." Tr. 71-75.

41. The Northeast Center received three bomb threats during the month of December 1984. The clinic was evacuated at the time of one threat because a 45-minute deadline was given. One patient was under general anesthesia at the time and woke up outside the building. Tr. 75.

42. Northeast Women's Center advertises its abortion services in the yellow pages, several newspapers, and on the radio. The Northeast Center also publishes a resource directory which is sent to physicians and referral agencies. Tr. 74-76.

43. Access to the Northeast Center is unlimited, and people are free to walk into the building in which the clinic is located and into the clinic itself. Tr. 79.

44. Elizabeth Lincoln, Director of Counselling and Training for Women's Health Services, Incorporated, testified at the hearing on February 7, 1985. I found her to be a candid and credible witness who qualifies as an expert in counselling, capable of testifying about the impact on women of passing through anti-abortion demonstrations before having abortions procedures or counselling.

45. Abortions are performed at Women's Health Services on Tuesdays, Fridays, and Saturdays. On the weekdays, two people routinely appear at the clinic to pass out leaflets against abortion. On Saturdays, before the Supreme Court decisions in 1983, a number of passive protestors would demonstrate outside the clinic. They would pray, chant or sing, and say the rosary. Tr. 94.

46. Since 1983, the demonstrators have become more aggressive in yelling and calling out to patients entering and leaving the clinic. The signs that are carried at these demonstrations have become much more graphic and contain pictures of fetuses or various cut-up doll parts with

signs reading "pro-choice meats." Plaintiffs' exhibits 14-21.

47. Women's Health Services has installed a sophisticated electronic security system and on Saturdays employs an off-duty police officer. Tr. 98.

48. Women's Health Services has also hired additional personnel to sit out in the hallway to ensure that no protestors enter the clinic and to ensure that patients arriving are not being hassled by protestors. Tr. 98.

49. During the past year, a pro-life person was able to break into the Services' phone lines through a CB radio and would interrupt phone calls to the clinic and would tell callers not to make appointments. Because the clinic was concerned that protestors might be able to copy information that a prospective patient gave over the telephone, the clinic ceased making appointments by telephone until they had new equipment installed to inhibit break-ins from other sources. Tr. 99-100.

50. One bomb threat was received at Women's Health Services during the last year. Tr. 100.

51. In her expert opinion which I credit, Ms. Lincoln testified that the impact of demonstrations like those occurring outside the Womens' Health Services clinic on women entering the clinic to obtain an abortion is to make the experience much more difficult for them by making them feel more socially isolated and sometimes increasing their feelings of guilt and sense of trauma. Tr. 101-103.

52. Ms. Lincoln also testified that the long-term effect on women is to lengthen the time it takes them to

resolve their emotional feelings about the abortion procedure.

53. Ms. Lincoln, in connection with the incident behind the York Hillcrest clinic involving the young woman who had just undergone an abortion and was then subjected to harassment by a pro-life crowd as she left the clinic, testified that she believes that the woman would suffer lifelong effects of the trauma to which she was subjected. Tr. 107-108.

54. Womens' Health Services advertises in the newspaper, yellow pages, and on the radio. Tr. 107-108.

55. Sylvia Stengle, Director of the Allentown Women's Center, testified at the February 7th hearing in a candid and forthright manner, and I found her to be a credible witness.

56. Allentown Women's Center performs first trimester abortions. The Center opened in October 1978. Tr. 118.

57. Since the Center opened there have been frequent Saturday pickets at the Center.

58. The intensity of these pickets increased in the early fall 1984. Tr. 118.

59. On October 6, 1984, there was a demonstration at the Allentown Women's Center orchestrated by Bishop Welsh of the Roman Catholic Diocese with much advanced publicity and meetings with the press. Nearly 450 protestors picketed on that day outside the clinic. No abortions were performed on October 6, 1984 because it was Yom Kippur. Tr. 119.

60. On October 13, 1984, one week later, the protest was repeated by about 40 people. The confrontational level that day was high with protestors snapping pictures of patients entering and leaving the clinic and jumping in front of cars with placards. Patients upon entering the clinic through the demonstration were visibly upset and distressed. Tr. 120-121.

61. A woman, representing herself as a reporter for the Wilkes-Barre paper went to the clinic to interview Ms. Stengle and then asked questions about how long Ms. Stengle had been killing babies. It turned out that although she had been a stringer for the paper, the woman was not on assignment at the time and was a pro-life supporter. Tr. 122.

62. The Allentown Women's Center advertises its abortion services in the yellow pages, college newspapers, and mailings to physicians and social workers. Tr. 124-125.

63. Sheila Miller, clinic administrator for the Women's Suburban Clinic, testified at the February 7, 1985 hearing in a candid and straightforward manner and I found her to be a credible witness.

64. For the past eight to nine months, protests have been held outside the Clinic three days a week.

65. On July 3, 1984, about 100 demonstrators appeared outside the Women's Suburban Clinic. Thirty to forty of these individuals barged into the Clinic with their arms in front of them blocking passage of anyone who wanted to get to the door or to stop them. Protestors started harassing the clients telling them not to kill their

babies. It took the police two and one-half hours to remove all of the protestors. Outside another 100 demonstrators continued to picket. Nineteen people were arrested. Two state legislators, Peter Vroon and Joseph Pitts accompanied the pickets outside and supported the activity of those who entered the building. Tr. 133-36; Plaintiffs' Exhibits 22-27.

66. On July 10, 1984, there was another demonstration by approximately fifteen people, several of whom tried to get into the Women's Suburban Clinic, but the doors were locked. One patient knocked at the door crying to be let in because two anti-abortion people were "hounding" her. These two protestors had just that day been released from jail for having entered the Clinic the week before. The police again arrested these individuals. Tr. 137.

67. An injunction was entered by Judge Wood of the Court of Common Pleas for Chester County after the July 3, 1984 incident limiting the scope of the protests. A final injunction was entered on October 29, 1984.

68. One doctor who performs abortions at the Suburban Clinic has been picketed at home. Tr. 140.

69. The Suburban Clinic advertises its services in the yellow pages, local medical services directories, and by mailings to physicians.

DISCUSSION

A. *Parties' Contentions*

The present posture of this case is unusual to say the least because plaintiffs never requested a preliminary injunction as to the disclosure requirements of sections 3207(b) and 3214(f). Rather, they opposed a stay of the proceedings as to the two provisions. I ordered a stay of the proceedings pending the appeal to the Supreme Court in order to avoid breaking this case into too many discrete pieces with the proviso that enforcement of the disclosure requirements of §§ 3207(b) and 3214(f) be enjoined. The proviso on the stay was the equivalent of a temporary restraining order necessitating a hearing before I could impose a preliminary or final injunction. This hearing was held on February 7, 1985.

At oral argument on April 11, 1985, plaintiffs argued that this aspect of the case is ripe for final disposition and that a permanent injunction would be appropriate at this stage. I am concerned, however, with making this case more complex than it presently is and want to avoid making piecemeal final orders. Moreover, the Commonwealth opposes a permanent injunction at this time. Therefore, the question presently pending before me shall be treated as a request by plaintiffs for a preliminary injunction, and the standards generally applied when considering a request for a preliminary injunction will be applied.

Plaintiffs contend that the disclosure requirements of sections 3207(b) and 3214(f) impose a legally significant burden on a woman's fundamental right to seek an abortion or abortion counselling and on the physicians and

staff members who provide abortion procedures and counselling. Disclosure under these provisions, plaintiffs claim, will substantially interfere with the right to free association, the right of privacy to make personal decisions, and the right of informational privacy. Therefore, because disclosure would threaten the free exercise of constitutionally protected rights, plaintiffs argue, the state must justify such disclosure with a compelling state interest that is substantially related to the information disclosed.

Defendants contend that no burden is imposed by the disclosure requirements on a woman's right to obtain an abortion. Moreover, defendants claim, the disclosure requirements are justified by important state interests including ensuring that shoddy practitioners do not hide behind the corporate veil, aiding citizens in the exercise of their first amendment rights to oppose abortion, providing a pool of statistical and medical knowledge, and protecting the public's freedom to choose medical providers in accordance with their beliefs.

B. *Standard for Preliminary Injunction*

The granting or denial of a request for preliminary injunction is ordinarily discretionary with the trial judge. This discretion is necessary because of the "infinite variety of situations which may confront" the court. *A.L.K. Corp. v. Columbia Pictures Indus., Inc.*, 440 F.2d 761, 763 (3d Cir. 1971). A preliminary injunction is an extraordinary and drastic remedy. The power to issue an injunction must be used sparingly, and relief should not be granted except in rare instances in which the law, the facts, and equities are clearly in the moving party's favor.

See Wright & Miller, Federal Practice & Procedure, § 1948, at 428-29 (1973).

To prevail on a motion for a preliminary injunction, the moving party must demonstrate: (1) that he is likely to prevail on the merits of the controversy, and (2) that he will be irreparably harmed *pendente lite* unless the motion is granted. In addition, the court should take into account, when relevant, (1) the possibility of harm to other interested parties from the grant or denial of the injunction, and (2) the public interest. Essentially, the court must balance the existing interests. *Oburn v. Shapp,* 521 F.2d 142, 147-8 (3d Cir. 1975).

C. *Likelihood of Success on the Merits*

Plaintiffs must demonstrate a *prima facie* case showing a reasonable probability that they will prevail on the merits. *Oburn v. Shapp,* 521 F.2d 142, 148 (3d Cir. 1970). Plaintiffs, therefore, must establish that there is a reasonable probability that the disclosure requirements of §§ 3207 (b) and 3214(f) will impose a legally significant burden on a fundamental right such as a woman's right to obtain an abortion. If a legally significant burden is established, the state must justify the disclosure requirements by a compelling state interest. If no burden is established, the issue is simply whether the state has a rational basis for requiring disclosure of the information obtained from the abortion facilities.

Beginning with *Roe v. Wade,* 410 U.S. 113 (1973), the Supreme Court has recognized that the fundamental constitutional right of privacy encompasses the right of a woman to decide whether or not to terminate her pregnancy. *See City of Akron v. Akron Center for Reproductive Health,* 103 S. Ct. 2481, 2487, (1983); *American College of Obstetricians v. Thornburgh,* 737 F.2d 283, 291 (3d Cir. 1984). Courts have also consistently recognized that, because abortion is a medical procedure requiring the advice and assistance of competent, trained medical personnel, a woman, to fully vindicate her fundamental rights, needs to have available to her a physician who is free to exercise his or her best medical judgment. *City of Akron,* 103 S. Ct. at 2491; *American College,* 737 F.2d at 291. Regulations affecting physicians and abortion clinic staff members potentially interfere a woman's right to obtain an abortion and woman's right to associate with the medical and counselling services necessary to effectuate the abortion decision.

In *Roe v. Wade,* the Court held that no compelling state interest justifies a sweeping prohibition of abortion and further concluded that during the first trimester of the pregnancy, little or no regulation is permissible. Even minor regulations on the abortion procedure may not interfere during the first trimester with physician-patient consultation or with the woman's choice between abortion and childbirth. *City of Akron,* 103 S. Ct. at 2493. At the same time, the Supreme Court has held that the right to privacy which includes a woman's right to terminate her pregnancy, while fundamental, is not absolute and the woman's fundamental right must be balanced against important state interests in abortion. *Roe,* 410 U.S. at 154; *City of Akron,* 103 S. Ct. at 2491.

Two state interests which may justify state regulation of abortion have been identified by the Supreme Court. First, a state has an important and legitimate interest in

protecting potential life. This interest, however, cannot become compelling until viability, *i.e.*, when the attending physician concludes that there is a reasonable likelihood of the fetus's sustained survival and meaningful life outside the womb. The second identified interest is the state's concern in maternal health which the *Roe* court concluded does not become compelling until "approximately the end of the first trimester of pregnancy." *Roe*, 410 U.S. at 163.

With these principles in mind, my first inquiry must be whether the disclosure requirements of sections 3207(b) and 3214(f) impose a legally significant burden on a woman's fundamental right to obtain an abortion. Plaintiffs contend that the compelled disclosure of the identity and location of facilities at which abortions are performed; the identity and location of their parent, subsidiary or affiliated organizations and corporations; and the total number of abortions performed at each facility and the number in each trimester as required by §§ 3207(b) and 3214(f) will subject women who seek medical services from those entities and their physicians and staff members to unwanted and unwarranted acts of violence, threats, intimidation and harassment from opponents of abortion. By subjecting women and their physicians to hostile acts by third parties opposed to abortion, the disclosure, plaintiffs contend, will have the effect of intruding both upon a woman's right of association with her medical personnel and upon her right of privacy in deciding whether or not to have an abortion. Plaintiffs further argue that compelled disclosure infringes upon the right of informational privacy.

Three years ago when I considered these same provisions, I concluded that plaintiffs had not established that

disclosure would impose a legally significant burden on the abortion decision. *American College*, 552 F. Supp. 791, 803-4 (E.D. Pa. 1982). Similarly, the Third Circuit concluded that plaintiffs (appellants) had not "as yet demonstrated a nexus between the disclosure of such information [§ 3207(b)] and the chilling of constitutional rights." *American College*, 737 F.2d 283, 297 (3d Cir. 1984). Much has happened in the intervening three years and plaintiffs provided sufficient evidence at the February 7, 1985 hearing for me to conclude that the disclosure provisions would impose a legally significant burden on a woman's fundamental right to obtain an abortion.

During the past year, a Presidential election year, abortion became a hotly contested political issue. As the evidence adduced at the hearing shows, pro-life protests have increased in frequency and intensity and at times have exploded into violent confrontations. In 1984, there were twenty-four bombings of abortion clinics nationwide compared with six in the previous two years combined. Several of plaintiffs' witnesses testified about takeovers of clinics by pro-life demonstrators which have resulted in arrests of up to thirty people at a time. Women entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter. The Pennsylvania Department of Health recognized in 1980 that "patient care may suffer if physicians or abortion clinics are under harassment." Plaintiff's Exhibit 7. The pattern of hostile behavior which

has developed in the past two years has also included picketing and verbal harassment of clinic physicians and staff members by name both at their facilities and at their homes and attempts to block ingress and egress at facilities.

Conceding that some women may have experienced "heightened anxiety and guilty feelings," defendants nevertheless contend that plaintiffs failed to provide any evidence that a woman's right to obtain an abortion would be obstructed or impeded by disclosure. Defendants further contend that because the majority of facilities which perform abortions, including the five clinics about which there was testimony at the hearing, advertise the availability of their services, plaintiffs cannot establish that the disclosure requirements of § 3207(b) and 3214(f) impose a legally significant burden on a constitutional right. Even if physicians who perform abortion procedures in their offices, accounting for 4% of the abortions in the Commonwealth in 1983, do not advertise and would discontinue providing abortions if subjected to the disclosure provisions, defendants contend, there would be no legally significant impact on a woman's right to obtain an abortion.

Relying on a line of cases in which the Supreme Court has adopted a flexible standard of proof where disclosure requirements are challenged, plaintiffs argue that a finding of a "reasonable probability" that the threats, intimidation, or harassment may result from disclosure of information is sufficient to warrant a conclusion that public disclosure will impose an legally significant burden on a woman's fundamental right to obtain an abortion. In *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court, holding that evidence of specific incidents of private and government hostility towards the

Socialist Workers Party and its members during the four years preceding trial was sufficient to establish that disclosure would chill first amendment rights of association, the Court specifically rejected the position that direct proof that disclosure of information would subject the individuals to threats, intimidation or harassment was necessary. Rather, the Court, adopting the test set forth in *Buckley v. Valeo*, 424 U.S. 1, 72 (1976) stated: "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties." 459 U.S. at 93. The Court, therefore, declared unconstitutional an Ohio statute requiring every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. *See also NAACP v. Alabama ex rel. Patterson*, 357 U. . 449 (1958) (In light of evidence of past incidents of retaliation upon disclosure, compelled disclosure of the NAACP's membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort.)

Each of the cases arose in the context of minority political organizations seeking protection from reprisal, threats, and violence. For this reason, defendants contest plaintiffs' reliance on them and contend that they address problems unique to minor political parties which have demonstrated a long history of official and unofficial oppression. In contrast to the right of political advocacy at issue in *Brown* and *NAACP*, defendants note, the right to obtain an abortion has been qualified. Moreover, defendants argue, plaintiffs here are simply advancing their

right to do business and the right of their patrons to take advantage of the services they offer.

I conclude that the flexible standard of proof established in *Buckley* and *Brown* for cases involving challenges to disclosure provisions is applicable here and, therefore, defendants' arguments must be rejected.[1] That the right to obtain an abortion is not absolute and is subject to certain qualification does not render the *Brown* standard inapplicable. As counsel for plaintiffs argued, one must look to how the right to obtain an abortion has been qualified and in particular must recognize that in the first trimester the right to obtain an abortion is absolute. Furthermore, the concern reflected in the Court's decisions in *Brown* and *Buckley* to the effect that it is frequently difficult to prove a direct impact on the exercise of constitutional rights by future enforcement of a statute that requires public disclosure of otherwise private information applies equally here.

1. When reviewing my earlier decision as to the disclosure requirements of § 3207(b), the Third Circuit stated:

> Appellants have not as yet demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights. therefore we find inapposite *Brown v. Socialist Workers '74 Campaign Committee*, 103 S. Ct. 414 (1982), on which appellants rely, where the Court held that compelled disclosure of party contributor lists may reasonably lead to harassment based on associational ties.

737 F.2d at 297-98. I interpret this language to mean that because plaintiffs had not presented any evidence showing any nexus or relation between disclosure and the chilling of constitutional rights, the question of whether or not the standard of proof set forth in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93 (1982) applied was never reached. Now, plaintiffs have established such a relation and the questions are whether disclosure would impose a legally significant burden on the fundamental right to obtain an abortion which can only be justified by a compelling state interest and to what standard of proof plaintiffs are to be held in establishing that burden. I have concluded that *Brown* and *Buckley v. Valeo*, 424 U.S. 1 (1976) provide the answer to the second issue.

It would be unreasonable to require plaintiffs to produce the testimony of a woman who if forced to pass through a crowd of heckling protestors would decide not to have an abortion or the testimony of a woman who has already been the target of protestors because to do so would be to subject these women to the very public scrutiny which they wish to avoid. Similarly, a physician who willingly performs abortions but who would not do so if his practice were disclosed to those opposed to abortion is likely to refuse to testify.

Applying the *Brown* standard, I conclude that there is a reasonable probability that the disclosure requirements will result in increased threats, harassment, or reprisals and will therefore impose a legally significant burden on the constitutional right to choose to have an abortion.[2]

2. My conclusion here is not intended to reflect in any way on the rights of those opposed to abortion to espouse their views. Although it is implicit in the conclusion that disclosure requirements impose a legally significant impact on the right to obtain an abortion that the actions of the protestors interfere with a woman's right to decide whether or not to terminate her pregnancy, the conclusion that disclosure requirements are unconstitutional has no bearing on the protestors' rights to continue to espouse their views on abortion publically, outside clinics, hospitals, physicians' offices or elsewhere. As Judge Wood noted when entering a permanent injunction on October 29, 1984 against a number of people who had demonstrated against abortion at the Woman's Suburban Clinic, the infringement on a woman's right to obtain an abortion must be balanced against the first amendment rights of those opposed to abortion. *Woman's Suburban Clinic v. Roberta Nelson, et al.,*

(Continued on following page)

Plaintiffs have clearly shown past harassment of women seeking abortions and of physicians, staff members and clinics which provide abortion services.

The evidence shows a pattern of increased protests and hostility at each of the clinics about which there was testimony; the protests have, at times, led to violence and the protestors have shown a marked disregard for court-issued injunctions. The clinics have been forced to increase security at their own expense. Yet despite the increased security, incidents like that at Northeast Center in December, 1984, where a bomb threat was received and because of the time deadline the clinic was evacuated and one patient who had been under a general anesthetic awoke on a guerney in the parking lot, still occur. As the expert testimony of Ms. Lincoln showed, a woman forced to pass through a crowd of heckling, hostile people, to enter a facility to obtain an abortion suffers heightened anxiety and guilt feelings which may not only affect the medical procedure itself but also cause long-term effects on her mental state. The Commonwealth has long recognized this fact, Plaintiffs' Exhibit 7, and produced no evidence to the contrary at the February 7 hearing. Moreover, hostility like that displayed by many protestors outside a clinic in-

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No. 84-04888, slip op. (Court of Common Pleas of Chester County, Pennsylvania, October 29, 1984). The Commonwealth, however, may not adopt the first amendment rights of those opposed to abortion as its justification for state compelled disclosure when disclosure of the information required by sections 3207(b) and 3214(f) will have the likely effect of increasing the burden caused by anti-abortion activity. Therefore, there is no constitutional right balancing against the infringement on woman's right to have an abortion.

trudes on a woman's right to decide for herself whether or not she is going to have an abortion.

Disclosure of information such as that which must be reported pursuant to sections 3207(b) and 3214(f) would provide groups opposed to abortion with a comprehensive list of all facilities in the Commonwealth at which abortions are performed, the number of abortions performed by each in total and by trimester, and the name and address of any parent, subsidiary or affiliated organizations, corporations, or associations which would otherwise not be available. Defendants contend, however, that because the five clinics about which there was testimony at the hearing advertise the availability of abortion services, plaintiffs cannot establish that disclosure will impose a legally significant burden on a woman's right to obtain an abortion.[3] Although plaintiffs might have been able to

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3. In their supplemental memoranda of law, the parties debate the question of which party bears the burden of proof with respect to advertisement. Plaintiffs contend that advertisement is a matter of defense and therefore the burden was on the defendants to produce evidence that all of the facilities, hospitals and physicians that perform abortions advertise. Defendants, on the other hand, contend that advertisement goes to the burden disclosure will impose on the right to obtain an abortion and therefore the burden of proof is on the plaintiffs to establish that there are providers of abortions who do not presently advertise and who would be adversely affected by public disclosure. I have concluded that defendants are correct that advertisement is an element of the "burden" imposed by disclosure and therefore is an element for the plaintiffs to establish, but I do not believe plaintiffs' failure to produce direct evidence on the issue of advertisement is detrimental to their case. In fact, I would expect plaintiffs to have the greatest difficulty in presenting evidence as to the effect of disclosure in a case where the probability of harm from disclosure is greatest. If disclosure will not have any adverse consequences, witnesses will readily come forward, but if disclosure will have an undesired or adverse effect, the witnesses will be reluctant to subject themselves to the same public exposure which the disclosure would cause.

produce some evidence about the number of facilities (including hospitals and physicians) which perform abortions and do not advertise the fact, I do not believe the failure to do so is detrimental to their position. First, it would be inconsistent with the *Brown* standard to require plaintiffs to produce the testimony of a physician, clinic or hospital staff member who does not presently advertise who would discontinue providing abortion services if the disclosure provisions were enforced.

Furthermore, defendants argument that even if all physicians ceased performing in-office abortions, there would be no appreciable effect on a woman's ability to obtain an abortion because physicians provide only 4% of the abortions performed in the Commonwealth must be rejected. Virtually all abortions performed by physicians in their offices are first term abortions for the obvious reason that abortions in later stages of pregnancy are more complicated; in the years 1975 through 1977, of the 3,088 abortions performed in physicians' offices all but eight (¼ of 1%) were performed prior to the 13th week of gestation. As the Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2492-3 (1983) stressed, even "minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient cousultation." Directly or indirectly causing any physician to cease performing abortions is an interference with the physician-patient consultation and restricts the number of facilities performing abortions.

Moreover, disclosure compelled by sections 3207(b) and 3214(f) pertains to information beyond that generally disclosed through advertisement. In addition to the name

and address of each facility, the name and address of any parent, subsidiary or affiliated organizations, corporations or associations, have contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility, and information about the total number of abortions performed per quarter as well as the total number of abortions performed per trimester will be revealed. This breadth of information goes far beyond the informational contained in a listing in the yellow pages or an advertisement in a newspaper.

Finally, if the information required by §§ 3207(b) and 3214(f) is available from other sources such as advertising as defendants claim, the Commonwealth cannot justify compelled disclosure even on a rational relation test. If for instance opponents of abortion already know of every facility which performs abortions, the names of any affiliated organizations and the applicable statistical information, public disclosure is rendered useless.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Supreme Court upheld certain recordkeeping requirements noting that "[r]recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." The Court specifically relied upon the fact that the records and reports were not be disclosed to the general public: "[t]he added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits." *Id.* at 81. Unlike the reporting provisions in *Danforth* which imposed no

burden on abortion facilities or women seeking abortions and which merely required the facilities to maintain confidential reports which could be inspected by state officials or opened to public health officials for purposes of gathering statistical information, sections 3207(b) and 3214(f) require disclosure of information which adversely impacts upon the physicians who provide the services and imposes a legally significant burden on the right to obtain an abortion.

Once it is determined that disclosure would result in a legally significant burden on the fundamental right to obtain an abortion, the burden shifts to the defendants to justify the burden by compelling state interest substantially related to the information to be disclosed. Defendants have proffered several justifications for disclosure which will be examined in *seriatim*.

Defendants devote the lion's share of their initial memorandum to arguing that disclosure pursuant to §§ 3207(b) and 3214(f) is justified by the state's compelling interest in facilitating the first amendment rights of those opposed to abortion. Defendants conclude that it is difficult to imagine a state interest of greater magnitude than facilitating the exercise of constitutional rights. I am seriously concerned about the ramifications of the argument defendants are advancing here and for several reasons, I decline to accept it.

The Supreme Court has identified only two state interests which may justify regulation of abortions: protection of potential life and concern over maternal health. *City of Akron*, 103 S. Ct. at 2491-2. Neither of these interests encompasses facilitating the rights of those opposed to abortion.

In support of their contention that aiding citizens in exercising their first amendment rights is a compelling state interest, defendants rely upon *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) in which the Court held that the owner of a large shopping complex could not preclude a particular group from distributing pamphlets and soliciting petition signatures. In *Pruneyard*, however, the Court concluded that there was no taking of property without just compensation and therefore no infringement of a constitutional right by the state law which promoted and facilitated the exercise of free speech. In this case, I have found that there is an infringement on the constitutional right to obtain an abortion. Moreover, in *Pruneyard*, the Court was considering a statute which provided a forum in which persons could exercise their first amendment rights, *i.e.*, the shopping plaza, whereas the disclosure under consideration here provides the content for the expression or exercise of first amendment rights.

Defendants also contend, relying on *Harris v. McRae*, 448 U.S. 297 (1980), that the Commonwealth has a legitimate interest in encouraging protests, demonstrations and the like which have the effect of influencing women to choose childbirth over abortions. In *Harris*, the Court held the Hyde Amendment, which precludes the use of any federal funds to reimburse the costs of abortions under the Medicaid program except in certain specified circumstances, constitutional. In so holding, the Court concluded that even though the effect of the amendment was to favor childbirth over abortion by means of subsidization of one and not the other, the amendment was not unconstitutional because it imposed no governmental restriction on

access to abortions. *Harris*, 448 U.S. at 297. *See also Maher v. Roe*, 432 U.S. 464, 475-76 (1977) (Citing "the basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") Unlike the passive action in refusing to fund abortion through Medicaid, disclosure, which will increase the likelihood of threats, harassment, and reprisal against women seeking abortions and against physicians and staff members providing them, is an affirmative action by the Commonwealth which interferes with the fundamental right to decide whether or not to have an abortion. Moreover, I am seriously disturbed by the Commonwealth's reasoning that it can support or foster one point of view when to do so will be to interfere with another group's constitutional rights.

Defendants also contend that the line of cases in which the Supreme Court has held that disclosure is permissible to further the government's interest in deterring illicit activities apply in this case. Relying on *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1960), defendants argue that the Commonwealth has a compelling interest in exposing to public view associations which, by their concealment, risk the enlistment of unknowing support.[4] In *Communist Party*,

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4. The Commonwealth's interest in exposing to public view associations which by their concealment may run the risk the enlistment of public support is set forth in 18 Pa. Cons. Stat. Ann. § 3202(d) which states:

> (d) Right of conscience.—It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons, and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

(Continued on following page)

the Court was concerned with people involuntarily assisting an organization involved in foreign-directed conspiracy which posed a potential threat to national security. A fundamental flaw with defendants' reliance on these cases is the implication that abortion itself is an illicit activity which of course it is not.

Defendants endeavor to overcome this flaw by arguing that the illicit activity is the activity of shoddy practitioners. While I am mindful that I must not substitute my judgment for that of the legislature, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) and I recognize the Commonwealth's concern about shoddy practitioners, I have been presented with no evidence to convince me that the disclosure of the information required by §§ 3207(b) and 3214(f) will deter or reveal shoddy practitioners. Moreover, that this disclosure will have the desired result does not follow so logically from the requirements that the Commonwealth is relieved of its

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(Continued from previous page)

obligation to provide supporting evidence.[5] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). The information required pertains only to parent, subsidiary and affiliated organizations and the number of abortions performed; it will reveal nothing about the quality of the service provided. If it becomes apparent that a particular facility or physician is providing services of below average quality, the Commonwealth will have available to it the name and address of any parent, subsidiary or affiliated organizations and will be able to track the "shoddy practitioner" behind the corporate veil. This should be sufficient to further the Commonwealth's intest in deterring shoddy practitioners. Moreover, the Commonwealth's interest is served by the enforcement of medical licensing statutes which do not require public disclosure of the names and addresses of abortion facilities.

The final interest the Commonwealth proffers to justify the disclosure requirements is the need for accurate detailed statistical information. While this interest is tangentially related to the identified interest in protecting maternal health and potential life, it does not rise to the level of a compelling interest sufficiently related to

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5. Addressing the issue of the disclosure requirement of § 3207(b), the Third Circuit held "[s]ince there has been no showing of any effect of the disclosure on the abortion decision, and the state has proffered the important justification that the provision will help insure that shoddy practitioners may not hide behind the corporate veil, we reject appellants' challenge." *American College*, 737 F.2d at 298. It is important to note that the court did not find that the concern about shoddy practitioners was a compelling state interest substantially related to disclosure. The court had no need to apply this test because the plaintiffs had not yet "demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights." *Id.*

disclosure to justify disclosure.[6] If state policy-makers or courts need access to this information, the Commonwealth can provide it without making it generally available to the public. Moreover, the Department of Health has recognized that it has no need to match the identity of the facility with its statistical report. Plaintiffs' Exhibit 7. It follows, therefore, that there is no compelling state interest justifying disclosing the information in this form to the general public.

Irreparable Harm

Once plaintiffs have shown a likelihood of success on the merits by showing the likelihood of an unconstitutional infringement on the right to obtain an abortion, the irreparable harm *pendente lite* requirement is satisfied. Because plaintiffs have established for purposes of a preliminary injunction that disclosure pursuant to §§ 3207(b) and 3214(f) will impose a legally significant burden on the right of a woman to obtain an abortion, they have met the irreparable injury requirement.

Another factor in considering whether to issue a preliminary injunction is the rights of the non-moving party. Because plaintiffs have demonstrated a likelihood of success on the merits, the rights of the non-moving party are overcome by the possibility of irreparable harm to a fundamental constitutional right. In addition to the rights of the non-moving party, I have considered the public interest. Because the public has an interest in both the

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6. Is is important to emphasize that plaintiffs are not contesting the reporting provisions of §§ 3207(b) and 3214(f). Rather, their challenge is restricted to the disclosure requirements of these two provisions.

fundamental individual rights and the legislative process, public interest favors a resolution consistent with my decision on the likelihood of success.

CONCLUSIONS OF LAW

Accordingly, I make the following conclusions of law:

1. The jurisdiction of this court is properly invoked.

2. Plaintiffs have established a reasonable probability that they will prevail on the merits.

3. Plaintiffs have established that they will suffer immediate irreparable injury if the preliminary injunction is not granted.

4. There is neither public interest nor a threat of irreparable injury to another interested party which is sufficient to defeat plaintiffs' request for preliminary relief.

/s/ DANIEL H. HUYETT, 3rd,
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 82-4336

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.

v.

RICHARD THORNBURGH, et al.

ORDER

NOW, June 17, 1985, for the reasons stated in the attached findings of fact, discussion and conclusions of law, IT IS ORDERED that:

Defendants are enjoined preliminarily and until final determination of this matter from enforcing the disclosure provisions of 18 Pa. Cons. Stat. Ann. §§ 3207(b) and 3214(f) and reports filed pursuant to §§ 3207(b) and 3214 (f) will be maintained in confidence by the Commonwealth and will not be made available for public disclosure.

/s/ DANIEL H. HUYETT, 3rd,
Judge

PENNSYLVANIA DEPARTMENT OF HEALTH

JUNE 12, 1985

(LOGO) NEWS RELEASE

HEALTH DEPARTMENT RELEASES 1984 ABORTION DATA

HARRISBURG, June 10—The number of abortions reported in the commonwealth has declined for the fourth

year in a row, the state Health Department said today, but the number performed on Pennsylvania women increased.

In 1984, there were 59,258 abortions performed, compared to a total of 59,288 performed in 1983. This represents a decrease of only 0.1 percent from 1983, but is a 9.9 percent decrease from the 1980 total of 65,777. There were 62,701 performed in 1981 and 60,772 performed in 1982.

Of the total number of abortions performed in the commonwealth, 56,462 were performed on Pennsylvania residents. This represents an increase of 1.3 percent from the 1983 figure of 55,726. Residents of other states and territories accounted for 2,786 and residents of other countries accounted for 10.

Nearly all abortions last year—53,588 or 90.4 percent—were performed within the first three months of pregnancy (first trimester). In 1983, 92.1 percent of all procedures were performed within the first three months of pregnancy. Second trimester procedures increased from 4,480 in 1983 to 5,522 in 1984.

Patients age 19 and under accounted for 16,149 of the abortions performed. This was 27.3 percent of the total, a decrease of 187 (1.1 percent) from 1983. As in previous years, the largest single age group was 20-24, accounting for 21,307—or 36.0 percent—of all 1984 abortions.

Of those patients living in Pennsylvania, almost a third—30.9 percent, or 17,453—were residents of Philadelphia. Other counties with a large number of resident abortions included Allegheny with 9,625; Montgomery with 3,477; Delaware with 3,280; and Bucks with 2,792. Of the

67 counties in Pennsylvania, 29 showed a decline in the number of resident abortions performed from 1983 to 1984.

As of December 31, 1984, there were 150 facilities in the commonwealth approved by the Health Department to perform abortions, as required by the Abortion Control Act. They all submitted the required reports for 1984.

# # #

1984 PENNSYLVANIA INDUCED ABORTION REPORT

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY AGE OF WOMEN JANUARY-DECEMBER 1984

AGE	NUMBER
10 or Less	0
11	1
12	29
13	150
14	543
15	1,263
16	2,100
17	3,019
18	4,355
19	4,689
20-24	21,307
25-29	12,250
30-34	6,040
35-39	2,768
40-44	640
Over 44	53
Unknown	51
TOTAL	59,258

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY COMPLICATIONS AND CONDITIONS JANUARY-DECEMBER 1984

	NUMBER
NO COMPLICATIONS OR CONDITIONS	58,369
COMPLICATIONS	
Hemorrhage	41
Infection	268
Uterine Perforation	36
Cervical Laceration	25
Retained Products	232
Other	118
CONDITIONS DISCOVERED	
Rubella Disease	6
Hydatid Mole	16
Endocervical Polyp	5
Malignancy	1
Other	141
TOTAL	59,258

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY LENGTH OF PREGNANCY JANUARY-DECEMBER 1984

WEEKS OF GESTATION	WEEKS ELAPSED FROM FIRST DAY OF LAST MENSTRUAL PERIOD	NUMBER
0-8	0-10	35,979
9-10	11-12	12,443
11-12	13-14	5,166
13-15	15-17	3,757
16-20	18-22	1,701
21-24	23-26	64
25+	27+	5
Unknown		143
	TOTAL	59,258

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY PROCEDURE JANUARY-DECEMBER 1984

ABORTION PROCEDURE	NUMBER
Suction Curettage	56,177
Sharp D & C	2,003
Intra-Uterine Saline Instillation	845
Intra-Uterine Prostaglandin Instillation	149
Hysterotomy	0
Hysterectomy	2
Other	50
Unknown	32
TOTAL	59,258

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA BY RESIDENCE OF WOMEN JANUARY-DECEMBER 1984

COUNTY	NUMBER	COUNTY	NUMBER
Adams	161	Montgomery	3,477
Allegheny	9,625	Montour	54
Armstrong	167	Northhampton	847
Beaver	612	Northumberland	197
Bedford	70	Perry	80
Berks	1,116	Philadelphia	17,453
Blair	236	Pike	28
Bradford	15	Potter	3
Bucks	2,792	Schuylkill	358
Butler	459	Snyder	67
Cambria	397	Somerset	118
Cameron	3	Sullivan	8
Carbon	167	Susquehanna	12
Centre	576	Tioga	42
Chester	1,826	Union	70
Clarion	93	Venango	124
Clearfield	199	Warren	27
Clinton	94	Washington	725
Columbia	133	Wayne	53
Crawford	180	Westmoreland	1,200
Cumberland	722	Wyoming	39
Dauphin	1,352	York	944
Delaware	3,280	Unknown	99
Elk	42	TOTAL PENNSYLVANIA	56,462
Erie	251		
Fayette	423		
Forest	9	OTHER STATES	
Franklin	82	Delaware	340
Fulton	4	Maryland	62
Greene	96	New Jersey	1,336
Huntingdon	53	New York	46
Indiana	276	Ohio	182
Jefferson	105	West Virginia	735
Juniata	31	Other States	69
Lackawanna	426	Unknown States	16
Lancaster	1,230		
Lawrence	147	SUBTOTAL—STATES OTHER THAN PA	2,786
Lebanon	334		
Lehigh	1,078	SUBTOTAL—OTHER COUNTRIES	10
Luzerne	680		
Lycoming	296	TOTAL OUT-OF-STATE	2,796
McKean	13		
Mercer	150	TOTAL ALL ABORTIONS	59,258
Mifflin	88		
Monroe	348		

INDUCED ABORTIONS PERFORMED IN PENNSYLVANIA
BY COUNTY OF PROCEDURE
JANUARY-DECEMBER 1984

COUNTY	NUMBER	COUNTY	NUMBER
Adams	—	Lackawanna	—
Allegheny	16,526	Lancaster	1
Armstrong	—	Lawrence	—
Beaver	17	Lebanon	37
Bedford	—	Lehigh	3,972
Berks	309	Luzerne	29
Blair	16	Lycoming	54
Bradford	16	McKean	—
Bucks	238	Mercer	1
Butler	—	Mifflin	3
Cambria	—	Monroe	322
Cameron	—	Montgomery	4,685
Carbon	—	Montour	34
Centre	112	Northampton	98
Chester	3,058	Northumberland	—
Clarion	—	Perry	—
Clearfield	—	Philadelphia	19,523
Clinton	—	Pike	—
Columbia	17	Potter	—
Crawford	—	Schuylkill	—
Cumberland	4	Snyder	—
Dauphin	6,494	Somerset	6
Delaware	3,233	Sullivan	—
Elk	—	Susquehanna	2
Erie	—	Tioga	—
Fayette	—	Union	13
Forest	—	Venango	2
Franklin	—	Warren	—
Fulton	—	Washington	20
Greene	—	Wayne	—
Huntingdon	7	Westmoreland	20
Indiana	—	Wyoming	—
Jefferson	—	York	389
Juniata	—	TOTAL	59,258

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CLERK

NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH,
H. ARNOLD MULLER,
HELEN B. O'BANNON,
MICHAEL J. BROWNE,
WILLIAM J. DAVIS,
LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. PETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M. D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D. O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees

On Appeal From The United States Court of Appeals For The Third Circuit

---

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Court has appellate jurisdiction to review a non-final decision of a court of appeals declaring provisions of state law unconstitutional in light of the fact that the appeal statute does not expressly apply only to final orders and the purposes which underlie the statute support a rule permitting review of non-final orders.

2. Whether a court of appeals properly may declare provisions of state law unconstitutional on appeal from a district court's disposition of a motion for preliminary injunction when it is clear that the defendants were not provided a sufficient opportunity to present their defenses.

3. Whether the Court of Appeals misapplied the precedents of this Court in declaring unconstitutional numerous provisions of Pennsylvania's Abortion Control Act.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

NO. 84-495

RICHARD THORNBURGH, et al.,

Appellants

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees

On Appeal From the United States Court of Appeals For The Third Circuit

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Court of Appeals, including the statements dissenting from the denial of rehearing in banc (J. S. App.[1] 3a-173a), is reported at 737 F.2d 283. The opinion of the District Court (J.S. App. 174a-272a) is reported at 552 F.Supp. 791.

JURISDICTION

The judgment of the Court of Appeals (J.S. App. 153a-154a) holding unconstitutional 18 Pa. Cons. Stat. Ann. §§3205, 3206, 3208, 3210(b) and (c), 321 and 3214(a),(b) and (h) (Purdon 1983) was entered on May 31, 1984. A timely petition for rehearing in banc was denied by order entered on June 28, 1984. J.S. App. 155a-156a. A notice of appeal to this Court (J.S. App. 1a-2a)

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[1] "J.S. App." refers to the appendix to the jurisdictional statement.

was filed on September 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2). In granting review, the Court postponed consideration of the question of jurisdiction to the hearing on the merits. If appellate jurisdiction is lacking, the Court has certiorari jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions are reproduced as an addendum to this brief.

STATEMENT

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit in which the court, in the course of reviewing a district court decision denying almost entirely a preliminary injunction,[2] held unconstitutional numerous provisions of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983) (hereinafter "the Act" or "the Pennsylvania Act"). Among the provisions stricken by the Court of Appeals were those dealing with informed consent (Section 3205), parental consent or judicial approval for minors (Section

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[2]The District Court preliminarily enjoined only the requirement that 24 hours expire between the time a woman receives certain specified information and performance of the abortion, 18 Pa. Cons. Stat. Ann. §3205(a) (Purdon 1983). (J.S. App. 270a).

3206), printed information (Section 3208), abortions after viability (Section 3210(b) and (c)), and reporting requirements for abortion providers (Sections 3211(c) and 3214(a) and (h)).[3]

Proceedings were commenced in the United States District Court for the Eastern District of Pennsylvania on October 2, 1982, when the appellees[4] filed an action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 in which they alleged that the Act

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[3]The Court of Appeals also struck down Section 3215(e), relating to coverage for abortion in insurance policies. That provision is not before the Court.

[4]The plaintiffs below (appellees in this Court) were the American College of Obstetricians and Gynecologists, Pennsylvania Section, individual physicians who perform abortions, abortion clinics, clergymen and one woman who desires to purchase comprehensive health insurance.

in its entirety violated various constitutional provisions.[5] With the Act scheduled to go into effect on December 8, 1982, appellees filed a motion for preliminary injunction on October 29, 1982. On November 18, 1982, the District Court ordered the parties, solely for purposes of a preliminary injunction hearing to be held on December 2, to submit by November 30 a stipulation of uncontested facts; a comprehensive statement of contested facts, with the proviso that "no party may contest a

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[5]Named as defendants below (appellants here) were Governor Thornburgh, Health Secretary Muller, Public Welfare Secretary O'Bannon, Insurance Commissioner Browne, Commonwealth Secretary Davis, Attorney General Zimmerman and Montgomery County District Attorney Smyth. Defendants Thornburgh and O'Bannon filed a motion to dismiss themselves as defendants. Appellees stipulated to the dismissal of Thornburgh, but the District Court has not issued an order on the dismissal requests.

fact unless it is prepared to present evidence regarding that fact at the preliminary injunction hearing"; and, a list of witnesses, together with a brief statement of the testimony to be presented by each witness. J.S. App. 274a-278a.

In view of the brief time available to prepare for the hearing and to meet the requirements of the judge's order outlined above, the parties agreed to a stipulation of facts solely for purposes of the motion for preliminary injunction. See App. 9a;[6] J.S. App. 176a, n.1. At the hearing on December 2 no testimony was presented. J.S. App. 177a.

Following the District Court's December 7 order denying almost entirely

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[6]"App." refers to the joint appendix filed together with this brief.

the preliminary injunction, on December 9 the Court of Appeals, on motion of appellees, enjoined enforcement of the entire Act pending appeal. After argument and reargument of the appeals, on May 31, 1984,[7] the Court of Appeals, in a split decision, held that numerous provisions of the Act were unconstitutional. J.S. App. 3a-152a. A petition for rehearing in banc was denied on June 28, 1984, with four judges dissenting. J.S. App. 155a-173a.

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[7]After expedited briefing and argument, the Court of Appeals ordered that the appeals be held pending decisions by this Court in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); and, Simopoulos v. Virginia, 462 U.S. 506 (1983), which were then pending before the Court. Following decisions in those cases on June 15, 1983, the Court of Appeals ordered that supplemental briefs be filed and reargument was held on November 21, 1983.

In her majority opinion for the court, Judge Sloviter held first that, although the appeal was from a preliminary injunction order, "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." J.S. App. 21a. The majority then proceeded to hold unconstitutional ten provisions of the Act. Chief Judge Seitz dissented in part, disagreeing with the majority's holdings of unconstitutionality as to Sections 3205(a)(2); 3208; 3210(c); 3211; and, 3214(a),(b) and (h). J.S. App. 132a-152a.

SUMMARY OF ARGUMENT

I. The Court has jurisdiction over an appeal, brought pursuant to 28 U.S.C. §1254(2), to review a decision of a court of appeals which, although not finally disposing of all the issues in the case, declares unconstitutional provisions of state law. Slaker v. O'Connor, 278 U.S. 188 (1929), which holds to the contrary should be overruled.

Slaker failed to take into account factors which demonstrate decisively that finality is not required. The statute itself does not expressly require finality. This omission by Congress must be regarded as purposeful since a number of jurisdictional statutes enacted at the same time as the predecessor to Section 1254(2) (43 Stat. 939, §240(b)) specifically required finality. See 43 Stat. 936, §128(9); 937, §237(a); 938, §238(3).

Section 1254(2) reflects a Congressional concern for maintenance of the delicate balance of federal-state relations. Congress recognized that federal court injunctions against enforcement of state laws raise serious questions which call for mandatory, expeditious review by this Court. It is faithful to this intention to construe §1254(2) to permit an appeal in this case.

This litigation was in its infancy when it reached the Court of Appeals on appeal from a preliminary injunction order. Much remains to be done in the District Court before a final judgment can be entered. Yet, if the Court of Appeals' decision cannot be reviewed by appeal at this time, this injunction, which we believe to be clearly erroneous, will remain in effect for an extended period. This result cannot be consistent with the intent of Congress which was to

facilitate in every way this Court's mandatory review of injunctions against enforcement of state laws.

II. The Court of Appeals exceeded the proper scope of its review when it declared unconstitutional numerous provisions of state law. The appeal before the Court of Appeals was from an order denying in most part a preliminary injunction. But without the suggestion of any party, the court reached the merits.

This Court has held squarely that this type of action is improper. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940). Preliminary injunction proceedings often are conducted hastily and may not afford the parties, especially defendants, a sufficient opportunity to present their cases. University of Texas v. Camenisch, 451 U.S. 390, 394-395 (1981); Meccano, Ltd.

v. John Wanamaker, New York, 253 U.S. 136, 142 (1920).

In the present case, the motion for preliminary injunction was filed more than four months after the statute was passed, but only a short time before it was to go into effect. Filed with the motion was a two volume compendium of affidavits, which later became the basis for a court-ordered stipulation. Appellants were not permitted to contest facts offered by appellees unless they were prepared to offer evidence at the preliminary injunction hearing. Thus, appellants had no fair opportunity to present their defenses.

III. Even the one-sided record presented to the District Court demonstrates, however, that the provisions struck down by the Court of Appeals are, to the contrary, in accord with this Court's recent decisions in City of

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (hereinafter "City of Akron") and Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) (hereinafter "Ashcroft").

A. In Ashcroft, the Court upheld a requirement for attendance of a second physician at abortions performed after viability, 462 U.S., at 485-486 (opinion of Powell, J.), 505 (O'Connor, J., concurring in part in the judgment and dissenting in part). To the extent that there must be an exception to the second-physician requirement for emergencies, Pennsylvania's statute explicitly permits an exception where "necessary to preserve maternal life or health. 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983), Addendum, at 27a.

B. Pennsylvania requires physicians to submit reports containing

information on abortions and abortion complications. 18 Pa. Cons. Stat. Ann. §3214(a), (b), (h) (Purdon 1983), Addendum, at 31a-33a, 40a-42a. In accordance with the decisions in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81 (1976) (hereinafter "Danforth") and Ashcroft, 462 U.S., at 487-488, the reports are not unduly burdensome and are confined to health-related data. Although some extra efforts will be required of clinic personnel to complete these reports, it will be minimal. Certainly, the reporting requirements impose no significant burden on a woman's right to decide whether to have an abortion.

C. Pennsylvania's informed consent statute for abortions, 18 Pa. Cons. Stat. Ann. §3205(a) (Purdon 1983), Addendum, at 9-13a, comports with this Court's holdings that a state may require

that information be given on the procedure and its consequences. See Danforth, 428 U.S., at 67. The giving of information on medically accurate risks, the age of the fetus, assistance available for childbirth, and the unforeseeability of physical and psychological effects has been approved by this Court on other occasions. City of Akron, 462 U.S., at 442-447 and n.37; Planned Parenthood Assoc. v. Fitzpatrick, 401 F.Supp. 554, 586-588 (E.D. Pa. 1975) (three-judge court), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976). Provisions requiring that the woman be informed of the identity of her physician and of the availability of optional printed materials are unobjectionable since they do not invade the physician's medical judgment.

The informational requirements clearly are severable from the require-

ment that several of the items of information be provided the woman by a physician. The Legislature's intention to permit severability is clear - there is a broad severability clause in the statute, Addendum, at 45a; the Legislature did not demonstrate a single-minded obsession with physician-only counseling, as is demonstrated by the omission of physician counseling from Section 3205(a)(2), Addendum, at 11a; the Legislature has demonstrated its desire, by passing this altered statute after a veto of a prior, similar measure, to have in effect a statute which meets constitutional standards.

D. The provisions for parental consent or judicial approval for minors' abortions provide the alternatives required by the Court in Ashcroft, 462 U.S., at 491 n.16 (Opinion of Powell, J.), 505 (O'Connor, J., concurring in

part in the judgment and dissenting in part). The statute, moreover, provides the framework for expeditious, confidential judicial approval proceedings. 18 Pa. Cons. Stat. Ann. §3206(f),(h) (Purdon 1983), Addendum at, 18a-19a, 20a.

Moreover, subsequent to the Court of Appeals' decision, the State Supreme Court issued detailed rules which provide unequivocally for confidential, expeditious consideration of a minor's request for judicial approval. Addendum, at 48a-54a. The Court may review the law as it stands now and uphold the statute. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981).

E. It is permissible for a State to require that the abortion technique used in an abortion performed after viability of the fetus be the one most likely to preserve the fetus' life,

unless the technique poses an increased risk to the woman. See Colautti v. Franklin, 439 U.S. 379, 400 (1979). Pennsylvania's statute on post-viability abortions, 18 Pa. Cons. Stat. Ann. §3210 (b) (Purdon 1983), Addendum, at 27a-28a, meets this standard.

The Court of Appeals clearly erred in failing to construe the statute in a manner which preserves its constitutionality. See United States v. Harriss, 347 U.S. 612, 618 (1954). The court read the statute, which permits use of an abortion technique more dangerous to the fetus only if the technique would pose a "significantly greater risk" to the woman, as requiring a trade-off of the woman's health in favor of the fetus. The District Court properly interpreted the statutory term as requiring only that a difference in risk be meaningful to permit use of an abor-

tion method riskier to the fetus.

Finally, evidence failed to show that, in practice, any differences in risk between alternative abortion methods fall into the shadowy, theoretical "insignificant" area. In fact, the appellees claim that they always use the method least risky to the fetus. App. 48a-49a, ¶182.

ARGUMENT

I. The Court May Review On Appeal A Non-Final Decision Of A Court Of Appeals Holding Unconstitutional A State Statute Because The Jurisdictional Statute Does Not Explicitly Require Finality, Interlocutory Review Is Consistent With The Purposes Supporting An Appeal As Of Right And An Interpretation Permitting Interlocutory Review Is Consistent With Other Jurisdictional Statutes.

In opposing this appeal, appellees argued that appellate jurisdiction was lacking because the Court of Appeals' decision was interlocutory. Motion to Dismiss or Affirm, 7-10. The Court, in granting plenary review, postponed the question of jurisdiction to the hearing on the merits. Order of April 15, 1985. Because a requirement of finality comports neither with the language, nor the purpose of the statute (28 U.S.C. §1254 (2)), the Court should take jurisdiction over this appeal.

A. Slaker v. O'Connor, 278 U.S. 188 (1929) Should Be Reconsidered Because The Court Failed To Properly Apply The Plain Language Of The Jurisdictional Statute.

Appellants appealed to this Court pursuant to 28 U.S.C. §1254(2), which permits an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . of the United States . . . ."[8] The statute, by its

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[8]Appellees generally concede that the statutory provisions which are the subject of this appeal were declared unconstitutional by the Court of Appeals. They argue, however, that the ruling regarding Section 3206 is not appealable because the Court of Appeals merely held that rules were required. Motion to Dismiss or Affirm, 7 n.4. But if this was not a ruling that, absent rules, the statute is unconstitutional, the only remaining possibility is that somehow the absence of rules violated state law. But appellees never raised a state law claim and the Court of Appeals did

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terms, does not require that a decision must be final in order to permit an appeal. Nevertheless, in Slaker v. O'Connor, 278 U.S. 188 (1929), the Court read into the predecessor statute a requirement of finality.[9] Slaker was followed without comment in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). More recently, however, the Court has questioned "the continuing vitality of the 'finality' requirement in the context of §1254(2), which unlike

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not purport to adjudicate such a claim. If it had, it would have exceeded the limits on federal court jurisdiction imposed by the Eleventh Amendment. Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984).

[9]Section 1254(2) is substantially identical to Section 240(b) of the Judiciary Act of 1925, 43 Stat. 939, the provision involved in Slaker.

such jurisdictional statutes as 28 U.S.C. §§1257 and 1291 has no 'finality' provision in the statute itself." New Orleans v. Dukes, 427 U.S. 297, 301-302 (1976) (per curiam).

Slaker should not be followed for several reasons. First, as the Court observed in New Orleans v. Dukes, supra, the Slaker Court never explicitly considered the language of the statute which, in contrast to other jurisdictional statutes, contains no express finality requirement. Second, the Court never considered, perhaps because the jurisdictional issue was not briefed or argued, the arguments that the purpose of the statute and the general scheme for appellate review of federal court decisions enjoining state laws support review of non-final decisions. Finally, Slaker provides no real analysis of the issue; indeed, its conclusions may be

dictum in light of the undisputed fact that "none of [the claims] questioned the validity of a state statute." Slaker v. O'Connor, supra, 278 U.S., at 189.[10]

For these reasons, the Court should take this occasion to re-examine the question whether an appeal under Section 1254(2) lies only from a final judgment.

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[10]The cases upon which Slaker relies, Collins v. Miller, 252 U.S. 364 (1920) and Martinez v. International Banking Corp., 220 U.S. 214 (1911), do not support the result it reaches. Collins dealt with a direct appeal from a district court order under §238 of the Judicial Code, 36 Stat. 1157. That same code permitted appeals to this Court from non-final judgments of the courts of appeals where the amount in controversy exceeded $1,000. Martinez construed a provision governing appeals from the Supreme Court of the Philippine Islands, which expressly applied only to final judgments, 32 Stat. 695, §10.

B. An Appeal May Be Pursued Under Section 1254(2) From A Non-Final Order Because The Legislation Which Produced That Provision And The Purposes Which Underlie It Point Clearly To A Congressional Purpose To Facilitate This Court's Review Before A Final Judgment

Section 1254(2) originated as Section 240(b) of the Judiciary Act of 1925, 43 Stat. 939. This provision was inserted into the legislation during the Senate debate. 66 Cong. Rec. 2919, 2925 (1925). The motivation for the amendment was the Senate's concern that there be mandatory Supreme Court review of decisions striking down state statutes, particularly since an appeal was permitted to the Supreme Court from a decision of the highest court of a state upholding a state statute in the face of a federal constitutional claim. 66 Cong. Rec. 2919, 2923-2924 (1925). See also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675-677 n.11 (1974), quoting

F. Frankfurter and J. Landis, The Business of the Supreme Court 277-278 (1928). There was no mention in the debate of the finality issue. But a review of the sections enacted along with Section 240(b) leads inescapably to the conclusion that, had Congress desired to impose a finality requirement, it would have done so explicitly.

First and foremost, the "parallel" provision authorizing appeals from state court decisions explicitly applied only to "[a] final judgment or decree." 43 Stat. 937, §237(a) (emphasis added). Second, the 1925 Act preserved the right of direct appeal to this Court from interlocutory orders of district courts granting or denying injunctions against state statutes and added a provision permitting an appeal "from a final decree granting or denying a permanent injunction" 43 Stat. 938, §238(3) (emphasis added). Third, the circuit courts of appeals were given jurisdiction over "final decisions" of district courts. 43 Stat. 936, §128(9) (emphasis added). Had Congress desired to limit Section 240(b) to final orders, it would have stated so clearly, as it did in the provisions outlined above. See 12 J. Moore, H. Bendix and B. Ringle, Moore's Federal Practice ¶ 435.01 [4], P. 6-60 (1982).

In addition to the plain language of Section 1254(2), the very reasons which undergird the statute support the argument that finality is not required. As one Senator observed during the debate, decisions nullifying state laws "go to the very structure of our Government." 66 Cong. Rec. 2757 (1925) (remarks of Sen. Swanson). That structure is severely weakened if erroneous injunctions against enforcement of state

statutes are permitted to remain in effect indefinitely before there arises a right to this Court's review.

There is no case which demonstrates better than this one the consistency between permitting an appeal from a non-final order and the purposes which underlie the appeal statute. Here, a court of appeals, at the earliest possible point in the litigation, has taken it upon itself to declare unconstitutional and enjoin a state statute. Still to be accomplished in the District Court is the full range of discovery which a case of this magnitude necessarily will require; a trial and ruling on the merits of appellees' numerous remaining claims; yet another appeal to the Third Circuit; and, possibly, review by this Court. During all this time, absent a right to appeal to this Court, it is likely that the Court of Appeals' initial, perhaps

erroneous, injunction would remain in effect.[11] Indeed, it would be rather a hollow victory for the Commonwealth and its citizens to succeed in having the injunction removed only after many years of litigation.

It would be at least ironic if the Court concluded that the scenario described above was consistent with the

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[11] There is, of course, the possibility that a non-final order could be entered by a district court permanently enjoining portions of a state statute while proceedings continue on other aspects of the law. But regardless whether such an order could be appealed immediately pursuant to 28 U.S.C. §1292(a)(1), compare Switzerland Cheese Assoc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) (holding that interlocutory review under §1292(a)(1), in certain circumstances, may be sought to review a permanent injunctive order), with Goldstein v. Cox, 396 U.S. 471 (1970) (holding that, based on the particular history of 28 U.S.C. §1253, direct review in the Supreme Court does not lie from interlocutory orders denying injunctive relief), the district court could certify the ruling as final permitting the normal appeal process to go forward immediately.

intent of Congress in 1925. That Congress, in the same measure which included the predecessor of Section 1254(2), specifically reaffirmed the right to appeal directly to this Court from interlocutory injunctions of district courts enjoining the enforcement of state laws. 43 Stat. 938, §238(3). This points unmistakably to the conclusion that Congress had no intention to limit an appeal under Section 1254(2) to a final order.

To be sure, as appellees concede (Motion to Dismiss or Affirm, 10-11), certiorari is available at this time to review the Court of Appeals' ruling. See Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975). But this does not undercut the importance of providing an appeal as of right. The Court has stressed the limited circumstances under which it will review on certiorari inter-

locutory orders. American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372, 384 (1893). While this rule no doubt is a prudent one, Congress in 1925 expressed in the clearest terms possible its belief that review of decisions enjoining state statutes should not be entrusted to discretionary review. See 66 Cong. Rec. 2754 (remarks of Sen. Copeland), 2756 (remarks of Sen. Walsh), 2920-2922 (correspondence between Chief Justice Taft and Sen. Copeland). The rule which we advocate is far more consistent with the intent underlying Section 1254(2) than one which permits only discretionary review.

We recognize, of course, that there is a strong federal policy disfavoring piecemeal review. Flanagan v. United States, No. 82-374 (Feb. 21, 1984), slip op. at 4-5. The Court, likewise, has stressed that "statutes

authorizing appeals are to be strictly construed." Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 43 (1983). But "a jurisdictional statute . . . must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 212 (1968). It is for Congress to weigh the competing concerns of the appellate dockets; this Court has the responsibility to ensure that there is no reduction of the jurisdiction prescribed by Congress. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181-182 (1955), quoted in Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 n.28 (1978). Whatever may be the importance of the finality rule in conserving the courts' resources, in cases such as this one there are at work

policies of greater importance than the avoidance of piecemeal review. In 1925, by a variety of measures, Congress sought to guarantee expeditious, complete review by this Court of decisions enjoining state statutes. The Court will be true to the intentions of Congress only if it permits this appeal.[12]

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[12]If the Court concludes that appellate jurisdiction is lacking, we urge the Court, pursuant to 28 U.S.C. § 2103, to grant certiorari. As the arguments which follow fully demonstrate, the Court of Appeals in this case substantially "departed from the accepted and usual course of judicial proceedings" and "decided . . . federal question[s] in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1 (a),(c).

II. The Court of Appeals Exceeded The Proper Scope Of Its Review In Declaring Unconstitutional Provisions Of State Law On Appeal From A District Court Decision Which Was Limited To A Ruling On A Motion For Preliminary Injunction.

The Court of Appeals held unconstitutional ten separate provisions of Pennsylvania law.[13] Although acknowledging that the appeal before it was from a ruling on a motion for a preliminary injunction, the court held that it could address the merits because of the "unusually complete factual and legal presentation." J.S. App. 2la. Because the Court of Appeals clearly exceeded the proper scope of its review in a manner which may unfairly foreclose defense of the disapproved provisions at trial, the judgment should be vacated

[13] 18 Pa. Cons. Stat. Ann. §§3205, 3206, 3208, 3210 (b) and (c), 3211(c), 3214(a),(b) and (h), 3215(e) (Purdon 1983). Addendum, at 9a-44a.

and the case remanded for entry of an appropriate order.

When ruling on a motion for a preliminary injunction, a district court must balance several factors -- chiefly, whether the plaintiff has demonstrated "that in the absence of [a preliminary injunction] . . . he will suffer irreparable injury and also that he is likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). See also University of Texas v. Camenisch, 451 U.S. 390, 393 (1981); Brown v. Chote, 411 U.S. 452, 456 (1973). On appeal from a preliminary injunction order, the reviewing court decides only whether the grant or denial of a preliminary injunction was an abuse of discretion. Doran v. Salem Inn, Inc., supra, 422 U.S., at 932; Brown v. Chote, supra, 411 U.S., at 457.

When faced in the past with the

question presented in this case, the Court unequivocally expressed its disapproval of attempts to rule on or litigate the merits when the court is faced solely with a motion for preliminary injunction. In Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940), the Court held that a three-judge District Court "committed serious error in thus dealing with the [merits of] the case upon motion for a temporary injunction." See also Withrow v. Larkin, 421 U.S. 35, 43 (1975) (District Court's initial judgment, later corrected, improperly declared unconstitutional state statute on motion for preliminary injunction). Similarly, in Brown v. Chote, supra, the Court rejected the appellant's attempt to secure a ruling on the merits in the course of an appeal from a preliminary injunction order. 411 U.S., at

456-457.[14]

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[14]Of course, this rule is not so inflexible as to require that a suit be tried to a final hearing when it appears to the appellate court that the plaintiff's claim is entirely without merit. Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Meccano, Ltd. v. John Wanamaker, New York, 253 U.S. 136 (1920); Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 485 (1900). But this exception to the normal rule has been applied only to consideration of the question whether the action should be dismissed because the plaintiff's complaint or proofs plainly failed to reveal a good claim. See Deckert v. Independence Shares Corp., supra, 311 U.S., at 287; Mast, Foos & Co. v. Stover Manufacturing Co., supra, 177 U.S. at 494-495. The Court has squarely rejected the argument that, on appeal from a preliminary injunction, a court of appeals may enter a final decree in favor of the plaintiff; a defendant "is entitled to his day in court with opportunity to set up and establish his defenses." Meccano, Ltd. v. John Wanamaker, New York, supra, 253 U.S., at 142. Recently, in Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (January 12, 1984), there was some disagreement among members of the Court regarding the nature of its inquiry. See Slip op., at 10 n.8 (majority concluded that its scope of review was broader than "abuse of discretion" because the District Court reached the merits); slip op., at 4 (Stevens, J.,

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The rationale for the rule limiting an appellate court's power to resolve the merits on appeal from a preliminary injunction order lies in "the significant procedural differences between preliminary and permanent injunctions." University of Texas v. Camenisch, supra, 451 U.S., at 394. The limited purpose of a preliminary injunction is to maintain the status quo pending a final ruling on the claims; this purpose

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concurring; preliminary injunction an abuse of discretion); slip op., at 7 (O'Connor, J. concurring; the Court concluded that issuance of a preliminary injunction was an abuse of discretion because plaintiffs had no chance of success on the merits); slip op., at 9-10 (three dissenting Justices would hold that the question simply was whether issuance of a preliminary injunction was an abuse of discretion). None of the opinions suggest, however, that Mayo is infirm or that judgment against defendants may be entered on appeal from a preliminary injunction order.

frequently requires that proceedings be conducted hastily "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Id., at 395. There is no requirement or expectation that a party must present his case on the merits at a preliminary injunction hearing. Ibid. The findings of fact and conclusions of law rendered in the preliminary injunction hearing are not binding at a hearing on the merits. Ibid. Even if the parties or the district court desires a consolidation of the trial on the merits with the hearing on the preliminary injunction motion, "'the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will afford the parties a full opportunity to present their

respective cases.'" Id., at 395, quoting Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1057 (CA 7 1972) (alteration in original).

Much like the proceedings reviewed in University of Texas v. Comenisch, supra and Brown v. Chote, supra, this case proceeded with great haste. The motion for a preliminary injunction was filed on October 29, 1982- more than four months after the Act was passed, but only a few weeks before it was to take effect. Follcwing a conference with counsel, on November 18, 1982, the District Court, in an order expressly limited to the motion for preliminary injunction, directed the parties to submit by November 30 a stipulation of uncontested facts; a comprehensive statement of contested facts, but with the proviso that "no party may contest a

fact unless it is prepared to present evidence regarding that fact at the preliminary injunction hearing [scheduled for December 2]; and, a list of witnesses, together with a brief statement of the testimony to be presented by each witness. J. S. App. 274a-278a. Although not mentioned in the District Court's order, the appellants also were obliged to produce for the hearing a lengthy brief addressing the many constitutional issues raised in the motion. Although this procedure may have been necessary in view of the impending December 7 effective date of the statute, it hardly represents an acceptable basis for a final ruling striking down provisions of state law. Brown v. Chote, supra, 411 U.S., at 457.

In fact, an examination of the stipulation reveals that it is decidedly one-sided in favor of the appellees. Of

the 229 paragraphs which comprise the stipulation, only a miniscule percentage arguably can be read as favorable to appellants' position below (Stipulation of Uncontested Facts, ¶'s 84, 87, 91, 93, 97, 102, 106, 107, 128, 130, 144, 176, 179, 193). The reasons for the lopsided record are apparent: although the statute was passed in June of 1982, the complaint was not filed until October and the motion for a preliminary injunction was filed on October 29; during this period the appellees plainly were gathering the facts which they presented in the 40 affidavits (comprising two volumes of material) attached to their motion for preliminary injunction. As could be expected, the appellants were hardly in a position, only a few short weeks later, to produce contradicting evidence. For this reason, the stipulation largely mirrors appellees' affida-

vits. The Court of Appeals, perhaps, was correct in labeling the factual record "unusually complete" (J.S. App. 21a), but only from appellees' perspective.

Appellants here find themselves in much the same position as the appellants in Mayo v. Lakeland Highland Canning Co., supra - "the court's opinion decid[ing] a question which was not open on the hearing . . . prejudices their position on final hearing . . . ." 309 U.S., at 316-317. Moreover, this point may not, as appellees argue, be glossed over simply by concluding that the statutory provisions are "unconstitutional as a matter of law" and "no factual record that might be developed on remand could alter this result." Motion to Dismiss or Affirm, 12. Mayo clearly precludes this argument. But even if it did not, appellants fully intend to present to the District Court a complete factual

record which, in their view, could affect the disposition of this case.

Without intending to present an exhaustive explication of their case, especially in the absence of any discovery, appellants intend to present evidence, at least, in the following areas:

1. Informed Consent and Printed Information - a significant number of women who undergo abortions are not presented with information necessary for them to make an informed choice. The limited information required to be provided by Pennsylvania's statute is medically accurate. This information must be provided to ensure a truly informed choice and the effects produced by ignorance are far more dangerous to the woman's health in the long-run.

2. Parental Consent/Judicial Approval for Minors - evidence will be pro-

duced to show that the procedures for judicial approval prescribed in the statute and court rules, in practice, provide an expeditious, confidential procedure for judicial approval of minors' requests for abortions.

3. Abortion After Viability Provisions - there are many cases in which, without risk to the woman's health, an abortion technique may be used which, in contrast to other available techniques, offers a far greater chance for survival of the fetus. The relative risks to the mother's health of the various available abortion methods are ascertainable. Finally, the characteristics of viable fetuses may justify awaiting a second physician, depending upon the risk to the woman. Evidence will show instances in which there have been live births but insufficient care has been provided to the child.

4. Reporting Requirements - the information which must be reported is vital to medical research and will serve the interests of maternal and fetal health. The information is of a nature which is, or should be, gathered in each case and the additional effort required in filling out the forms is minimal.

This and other evidence which appellants may present certainly could alter materially the analysis of the constitutional issues presented by this case. The District Court and the parties anticipated this change in focus; the court carefully limited its consideration to the preliminary injunction question and the parties so limited their stipulation. J.S. App. 176a n.1, 270a-272a, 274a-278a; App. 9a-10a. In light of the haste with which the case proceeded in the District Court, the lack of notice or expectation on the appellants' part

that a ruling on the merits would eventuate and the substantial additional evidence which appellants intend to offer at trial, the "resulting record [produced below] was simply insufficient to allow [the Court of Appeals] . . . to consider fully the grave, far-reaching constitutional questions presented." Brown v. Chote, supra, 411 U.S., at 457.

Although we argue in the following sections of this brief that the portions of the statute at issue here may be upheld on this record, they certainly may not be enjoined permanently at this stage. On this ground alone, the judgment should be vacated.

III. The Provisions of Pennsylvania's Abortion Control Act Held Unconstitutional By The Court of Appeals, In Fact, Are Consistent With This Court's Decisions.

The Court of Appeals, based upon its view of the law and the limited record presented below, declared unconstitutional provisions of Pennsylvania's Abortion Control Act dealing with informed consent (Section 3205), parental consent or judicial approval of abortions for minors (Section 3206), printed information (Section 3208), abortions after viability (Section 3210(b) and (c)), and reporting requirements for abortion providers (Sections 3211(a); and 3214(a),(b) and (h)). As we have argued, Part II, supra, if these provisions require evidentiary support to be sustained, appellants are prepared to present the necessary proofs at trial. But it is, nevertheless, within the Court's

power to decide that, on the face of the complaint and the proof offered by the appellees (plaintiffs) below, the provisions in question are constitutional. See p. 38-39 n. 14, supra. For these reasons, we address in the arguments to follow the merits of the constitutional challenges to the statute.[15]

Little more than two years ago the Court examined a number of state and municipal provisions regulating the performance of abortions. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (hereinafter "City of Akron"); Planned Parenthood Assoc. of

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[15]We have not appealed at this time the Court of Appeals' ruling striking down 18 Pa. Cons. Stat. Ann. §3215(e) (Purdon 1983) (relating to coverage for abortions in insurance policies). Appellants have not abandoned defense of this provision (see Jurisdictional Statement, 4 n.3) and appellees concede that an appeal may be taken after final judgment in the District Court. Motion to Dismiss or Affirm. 10 n.5.

Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) (hereinafter "Ashcroft"); Simopoulos v. Virginia, 462 U.S. 506 (1983). Because Pennsylvania's regulations at issue here are similar to many of the provisions examined in the recent cases, we largely confine ourselves to a discussion of those cases.

The Court reaffirmed in City of Akron the validity of Roe v. Wade, 410 U.S. 113 (1973) and the cases since Roe which have refined the standard for review of abortion regulations. 462 U.S., at 426-431. There remains the familiar framework: regulations affecting the abortion decision which are reasonably related to the State's compelling interest in maternal health are permissible after the first trimester; and because the state has a compelling interest in the preservation of potential life after viability, regu-

lations governing, even proscribing, abortions are permissible after viability (roughly the beginning of the third trimester), if reasonably related to the State's compelling interest and not destructive of maternal life or health. Id., at 427-428. Finally, regulations which operate during the early weeks of pregnancy but "that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives." Id., at 430.[16]

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[16]In addition, The State properly may assert interests in protecting children which justify regulations not permissible for adults. City of Akron, 462 U.S., at 427-428 n. 10.

A. Pennsylvania's Statute Requiring Attendance Of A Second Physician During Abortions Performed After Viability Is Constitutional Because The Statute Contains A Medical Emergency Exception Every Bit As Explicit As The Statute Upheld In Ashcroft.

Section 3210(c) of the Pennsylvania statute requires that a second physician, whose job it is to care for the child, be present during abortions performed after viability.[17] In Ashcroft, the Court upheld Missouri's second-physician requirement finding that it was justified by the State's compelling interest in preserving potential life. 462 U.S., at 476-477 (Powell, J., joined by the Chief Justice); at 505 (O'Connor, J., joined by White, J., and Rehnquist, J., concurring in part in the judgment and dissenting in part). In

[17]Section 3210(c) is reprinted in the Addendum, at 28a-29a.

light of this holding, the Court of Appeals did not conclude that a second-physician requirement for post-viability abortions necessarily is impermissible. J. S. App. 71a-72a. Rather, the court read Ashcroft to require a "clearly expressed" exception to the second-physician requirement for "medical emergencies." J.S. App. 72a-73a. The Court then held that Pennsylvania's statute did not meet this standard. The Court's decision represents both an incorrect reading of Ashcroft and an incorrect application of the standard.

Of the five Justices who voted to uphold Missouri's statute, three made no mention of the explicit exception required by the Third Circuit. 462 U.S., at 505 (O'Connor, J., joined by White, J., and Rehnquist, J., concurring in part in the judgment and dissenting in part). Clearly, a statute which

includes at least the protections offered by Missouri's provision would be approved by those Justices. Likewise, Justice Powell, joined by the Chief Justice, did not conclude that there must be an explicit exception for emergencies. Rather, he was satisfied with an implicit exception to the second-physician requirement which he read into the proviso "'that it [the steps taken by the second physician to preserve the fetus] does not pose an increased risk to the life or health of the woman.'" Id., at 485 n. 8, quoting Mo. Rev. Stat. §188.030.3 (Supp. 1982). So contrary to the holding of the Court of Appeals, five Justices voted to uphold Missouri's statute despite the absence of an

express emergency exception.[18]

Pennsylvania's statute is far more explicit than was Missouri's. In the general provisions found at the beginning of Section 3210 the Legislature provided, "It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he concluded in good faith, in his best medical judgment . . .

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[18]Four Justices, in an opinion authored by Justice Blackmun, concluded that an exception for emergencies must be express and that a second-physician requirement is permissible only if narrowly drawn to exclude circumstances in which the abortion method precludes survival of the fetus. 462 U.S., at 498-503 (Blackmun, J., concurring in part and dissenting in part). As to the second point, Pennsylvania's statute satisfies Justice Blackmun's concerns by limiting its requirements to "an abortion the method chosen for which, in [the physician's] good faith judgment, does not preclude the possibility of a child surviving the abortion." 18 Pa. Cons. Stat. Ann. §3210(c) (Purdon 1983), Addendum, at 28a.

that the abortion was necessary to preserve maternal life or health." 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983) (emphasis added), Addendum, at 27a. Of course, Section 3210(c) is a part of the "section" referred to in part (a). The Court of Appeals ignored the Legislature's clearly expressed intent in rejecting application of this exception to Section 3210(c). See J.S. App. 144a-146a (Chief Judge Seitz dissenting on the ground that the exception for emergencies is express).

Appellees' argument (Motion to Dismiss or Affirm, 19-20) that this reading of the statute does not square with the more restrictive general definition of "medical emergency" (18 Pa. Cons. Stat. Ann. §3203 (Purdon 1983)) misses the mark. The phrase "medical emergency" has no intrinsic magic - it may mean different things in

different circumstances. Whatever may be required in other contexts, the point here is plain - five Justices in Ashcroft found sufficient to pass muster a provison which, although somewhat ambiguous in its application to an emergency precluding attendance of a second-physician, could be read as providing an exception to the second-physician requirement where the requirement would pose an increased risk to the woman's "life or health." Pennsylvania's statute provides an exception in identical terms and is expressly made applicable to the second-physician provision. Under these circumstances, not only does the statute suffice under Justice Powell's opinion, it also provides the express exception on which the dissenters in Ashcroft insisted. The judgement of the Court of Appeals as to Section 3210(c) should be reversed.

B. The Requirement That Physicians File Reports Containing Information Relating To Abortions And Complications From Abortions Is Constitutional Because It Creates No Significant Impact On The Exercise Of The Abortion Decision And Is Directly Related To Important State Health Objectives.

Section 3214(a), (b) and (h)[19] prescribe reporting requirements for abortions and abortion complications. The Court of Appeals struck down these provisions because of its views that completing the forms will increase costs, the information requested is too detailed, and the requirement that a physician report a basis for certain medical judgments could chill physicians' willingness to perform abortions. J. S. App. 79a-81a. Because the Court of Appeals failed to apply properly this

[19]Sections 3214(a), (b) and (h) are reproduced in the Addendum, at 31a-33a, 40a-42a.

Court's precedents, its ruling must be reversed.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81 (1976), the Court concluded that record-keeping requirements for abortions are "useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." (Footnote omitted). To this day "questions remain as to the long-range complications [of abortions] and their effect on subsequent pregnancies." Ashcroft, 462 U.S., at 487-488 (Opinion of Powell, J.). Reports on abortions, including "complication reports, provide a statistical basis for studying the complications." Ashcroft, 462 U.S., at 488 (Opinion of Powell, J.). There can be little question that the reports required by Pennsylvania are

useful in studying abortion and its complications. In fact, the requested information, in many respects, corresponds to information gathered by the federal Centers for Disease Control. See Department of Health and Human Services, Centers for Disease Control, Abortion Surveillance: Annual Summary 1979-1980, p. 3-9, 30, 34-42 (1983). Certainly, there is no requirement imposed which restricts or regulates the physician's medical judgment or in any manner influences the woman's exercise of her right of choice.[20]

The Court of Appeals apparently

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[20]There is no basis in the record, or logic, for the Court of Appeals' conclusion that reporting requirements, which require physicians to report the basis for certain medical judgments, will influence physicians not to perform abortions. Certainly professionals may be required to document their decisions. The information requested serves useful medical/statistical purposes and provides a guide for further legislative action.

was persuaded by the amount of information to be reported that these requirements violated the Court's caution in Danforth that reporting not be "overdone" so as to "accomplish, through the sheer burden of recordkeeping detail," a restriction on abortions. 428 U.S., at 81. See J.S. App. 79a-80a. But an examination of the reporting forms reveals that they are easily completed by checking blocks or filling in blanks. Addendum, at 55a-57a. There is no evidence that substantial time will be required for clinic personnel to complete these forms, especially since the information requested clearly is of a type routinely gathered or instantly observable. The most that appellees are able to show is that their current practices will need to be modified and any unspecified cost increases will be passed on to their patients. App. 51a, ¶194. But it

hardly could be argued that the cost of filling in these simple forms will exceed the cost of the pathology examination and report found in Ashcroft to be a "relatively insignificant burden." 462 U.S., at 490 (Opinion of Powell, J.); 505 (O'Connor, J. concurring in part in the judgment and dissenting in part; "no undue burden").[21]

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[21] In the course of its holding, the Court of Appeals struck down related provisions requiring preparation of statistical compilations (with protection for the confidentiality of the patient and the person filing the report), 18 Pa. Cons. Stat. Ann. §3214(e) (Purdon 1983), and for a physician to report the basis for his judgment that abortion of a viable fetus was necessary to preserve maternal life or health, 18 Pa. Cons. Stat. Ann. §3211(a) (Purdon 1983). J.S. App. 75a-77a, 82a. Of course, our argument that the reporting requirements are valid subsumes the related contention that the information gathered from these reports must be made available if it is to be useful. As to Section 3211(a) we note Chief Judge Seitz's dissent in which he points out that this provision never was challenged

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The reporting requirements are justified by important state health objectives and are not so costly as to amount to a significant burden on the abortion decision. The judgment of the Court of Appeals should be reversed.

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by appellees. J.S. App. 146a. Certainly, appellees never challenged the requirement that a determination be made whether the fetus is viable. Section 3211(a) is not objectionable since it requires no more than a statement of the "good faith" basis for the physician's judgment. See Danforth, supra, 428 U.S. at 63-64 (dictum); at 89 (Stewart, J. concurring). Moreover, it is untenable to suggest that the State may not require verification of the basis for third-trimester abortions in order to insure that its compelling interest in protecting life is not improperly thwarted.

C. Pennsylvania's Requirements For Informed Consent Are Constitutional Because They Require Only The Provision Of Relevant Information Which Is Not Designed To Influence The Woman's Choice Between Childbirth And Abortion.

Section 3205(a) of Pennsylvania's statute requires that a woman give her informed consent to an abortion.[22] The statute sets forth several general categories of information which must be provided to the woman to insure informed consent. The Court of Appeals held that this provision must fall because it is too specific and is not severable from the requirement that some of the information must be provided by a physician. See J. S. App. 46a-50a. The court's conclusions are without merit.

A State may require that a woman give informed written consent for an

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[22]Section 3205(a) is reproduced in the Addendum, at 9a-13a.

abortion. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976). This includes information regarding "just what would be done and its consequences." Ibid. "[T]he state legitimately may seek to ensure that [the decision] has been made 'in light of all the attendant circumstances - psychological and emotional as well as physical - that might be relevant to the well-being of the patient.'" City of Akron, 462 U.S., at 443, quoting Colautti v. Franklin, 439 U.S. 379, 394 (1979). Nevertheless, the state may not require a physician to deliver information which is designed to influence the woman's choice. City of Akron, 462 U.S., at 443-444.

In City of Akron, the Court found objectionable an extraordinarily specific informed consent ordinance which required that physicians provide

each woman a litany of information, described by the Court as a "parade of horribles", much of which was of "dubious" validity and plainly designed to influence the woman's choice. Id., at 444-445. The Court indicated, however, that statutes "describing the general subject matter relevant to informed consent," id., at 445, and "describ[ing] in general terms the information to be disclosed", id., at 447, are permissible. Pennsylvania's statute meets this test.

Section 3205(a)(1)(i) requires that the woman be told who will perform the abortion. This is an entirely sensible, non-influential piece of information. Appellees hardly can be heard to argue that they should be permitted to keep the physician's identity a secret from the patient.

Section 3205(a)(1)(ii) requires that the woman be informed "that there may be detrimental physical and psychological effects which are not accurately foreseeable." This provision was carried forward from a prior Pennsylvania statute which was upheld against the precise challenge leveled here. Planned Parenthood Assoc. v. Fitzpatrick, 401 F.Supp. 554, 586-588 (E.D. Pa. 1975) (three-judge court), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976).[23] In fact, the order in

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[23]The prior Pennsylvania statute defined "informed consent" to require that the pregnant woman be advised "(i) that there may be detrimental physical and psychological effects which are not foreseeable, (ii) of possible alternatives to abortion, including childbirth and adoption, and (iii) of the medical procedures to be used." Pa. Stat. Ann. tit. 35, §6602 (Purdon 1977). The question presented in Franklin is precisely the one presented here as to the items of information common to the two statutes:

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Franklin indicates specifically that the affirmance is on the strength of Danforth.[24]

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> Do Pennsylvania Abortion Control Act's "informed consent" provisions invade constitutionally protected privacy of physician-patient relationship by dictating content of physician's counseling of woman with regard to abortion decision, regulate abortions more stringently than other medically indistinguishable procedures, and impose restrictions upon abortion during first trimester of pregnancy inconsistent with U.S. Supreme Court's holding in Roe v. Wade, 410 U.S. 113, 42 LW 4313 (1973)?

Juris. Statement in Franklin v. Fitzpatrick, O.T. 1975, No. 75-772. The question being squarely presented, the affirmance controls the issue here. Illinois Election Board v. Socialist Workers Party, 440 U.S. 173, 182 (1979).

[24]The evidence offered by appellees below included the assertion that informing women that there may be unforeseeable detrimental effects from an abortion would not be in the best medical interest of a woman because, "standing alone" this information will be confusing and of little help in influencing her decision. App. 43a-44a, ¶105. Assuming that this statement is

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Section 3205(a)(1)(iii) requires that the woman be given "medically accurate" information on the "particular medical risks" associated with her abortion; and sub-part (v) requires that similar information be provided for childbirth. Of course, the Court has held that the State may seek to ensure that a woman is enlightened as to the consequences of her choice. City of Akron, 462 U.S., at 442-443, 446-447; Danforth, 428 U.S., at 67. The statute does no more than guarantee provision of this highly relevant, accurate information.

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> correct, what appellees fail to appreciate is that physicians or counsellors are free to, and should, give additional information which tailors the explanation to each woman's personal circumstances. It scarcely may be argued that there are not always unforeseeable potential effects from medical treatment and that all patients should not be cautioned of this possibility.

Section 3205(a)(1)(iv) provides that a woman should be informed of the probable gestational age of the fetus. This is a provision which requires only the offering of accurate, relevant, non-judgmental information - a type of information the Court found "certainly . . . not objectionable" in City of Akron, 462 U.S., at 445-446 n. 37.

The information outlined in Section 3205(a)(2) likewise is unobjectionable. Subparts (i) and (ii) provide that information be given on the help available should childbirth be chosen - medical assistance benefits and support payments. Finally, the woman, may, but only if she expressly chooses to do so, review materials which describe the unborn child and list agencies to help her. Section 3205(a)(2)(iii). Again, the Court has found permissible a requirement that information be supplied

on the "availability of assistance" for pregnant women. City of Akron, 462 U.S., at 445-446 n. 37. Certainly, information on the availability of optional materials is not objectionable. Appellees never have argued that women should not be provided with relevant information which they request.

So it is clear that each item of general information outlined in Pennsylvania's statute comports with this Court's prior holdings on the permissible scope of informed consent regulations. Appellees, relying on City of Akron, then are left with the argument that the statute nevertheless must fall because, as to the items listed in subsection (a)(1), the statute requires that a physician personally convey the information. Motion to Dismiss or

Affirm, 21-22.[25] But there are controlling differences between City of Akron and this case.

We expressly argue, as the City apparently did not, that the physician-counselling requirement is entirely severable from the information requirements. In each case, severability is a question the answer to which turns on legislative intent: would the Legislature have approved the statute with the offending provisions removed. See Carter

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[25]Appellees also appear to argue that Pennsylvania's statute is infirm because it requires that a "litany" of information be provided in every case. Motion to Dismiss or Affirm, 22. But City of Akron and Franklin v. Fitzpatrick dispose of any argument that the State may not give general guidance on the categories of information to be covered in obtaining informed consent. As we outline in the text, the categories of information described in Pennsylvania's statute either have been specifically approved by the Court or are within the Court's prior descriptions of permissible informed consent statutes.

v. Carter Coal Co., 298 U.S. 238, 312-313 (1936).

Here there is no question that Pennsylvania's Legislature would have passed the informed consent provisions without a physician-counselling requirement. The Act has a broad severability clause. Act No. 1982 - 138, §5, 1982 Pa. Legis. Serv. 750, 794 (Purdon), Addendum, at 45a. The Legislature strongly indicated its intention to have in force an appropriate statute regulating abortion when, after a gubernatorial veto of an earlier measure, it approved this revised statute. See J.S. App. 13a-14a. Finally, the Pennsylvania Legislature did not attach to physician-counselling the importance ascribed to it by the City of Akron; one portion of the statute expressly permits counselling by other personnel. Section 3205(a)(2).

As Judge Weis pointed out in dissenting from the denial of rehearing, there are "significant differences" between Pennsylvania's statute and Akron's ordinance. J.S. App. 163a-164a. The Pennsylvania statute requires no parade of horribles and has no single-minded compulsion for physician-counselling. Under the standards laid down in City of Akron and Danforth, this statute must be upheld.

D. The Parental Consent/Judicial Approval Provisions Are Constitutional Because They Provide An Adequate Alternative To Parental Consent For Minors And There Is An Appropriate Framework For Confidential, Expeditious Judicial Proceedings.

Pennsylvania requires that unemancipated minors secure parental consent or judicial approval for an abortion. Section 3206.[26] The Court of Appeals held that the statute meets the standards for minor consent statutes prescribed by this Court. J.S. App. 50a-52a. But the court's concerns with the "procedural inadequacies" of the statute caused it to enjoin the provision pending more detailed rules from the State courts. This holding was not warranted at the time; it is all the more unsupportable now in light of new,

[26]Section 3206 is reproduced in the Addendum, at 14a-22a.

detailed rules issued after the court's decision.

The Court of Appeals was concerned that the statute did not provide adequately for expeditious, confidential judicial approval proceedings. J.S. App. 56a. The statute itself (§3206(f), (h))[27] and instructions from Pennsylvania's Chief Justice[28] generally required quick action and confidentiality. The Court of Appeals made no mention of this Court's repeated admonitions in

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[27]Section 3206(f) provides for confidential proceedings on the petition of a minor and a ruling within three days. Subsection (h) requires an expeditious, confidential appeal.

[28]As the Court of Appeals observed, the State Chief Justice instructed the local courts to apply applicable adoption rules, which include confidentiality provisions. See 23 Pa. Cons. Stat. Ann. §§2905-2906 (Purdon 1983).

this precise context that the federal courts must give weight to the State's obligation to follow the dictates of its statute and the Constitution. Ashcroft, 462 U.S., at 491 n. 16 (Opinion of Powell, J.); Bellotti v. Baird, 443 U.S. 622, 645 n. 25 (1976)(plurality opinion).

In any event, Pennsylvania now has new detailed rules, Pennsylvania Orphan's Court Rules 16.1-16.8, Addendum, at 48a-54a,[29] which go far beyond the requirement that provisions on expedition and confidentiality provide a "framework" for a constitutional system of judicial approval.[30] Ashcroft, 462 U.S., at 491

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[29]The new rules are reprinted in 23 Pa. Cons. Stat. Ann. following § 794 (Purdon Supp. 1985).

[30]Based on the new rules, appellants moved in the District Court for a lifting of the injunction against enforcement of Section 3206. App. 53a. The District Court ruled that it was without jurisdiction to rule on the motion because of

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n. 16 (Opinion of Powell, J.). So whatever may be the merits of the Court of Appeals' conclusions, it is now clear that confidential proceedings and speedy action are expressly guaranteed.

The petition for judicial approval need only include the minor's initials. Rule 16.2(a)(1). The woman's name shall not be entered on any public docket and the proceeding shall be closed to all but essential persons such as the minor's parents. Rule 16.4. The record shall be sealed and all documents relating to the proceeding must be impounded. Rule 16.6. Any reported

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the pendency of this appeal. App. 57a. Nevertheless, the Court should address the issue in the context of the law as it stands now. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281-282 (1969).

decision may not disclose the minor's identity. Ibid. Appeals are confidential. Rule 16.8.

In Ashcroft, the Court upheld Missouri's statute, which assured confidentiality by permitting the minor to use her initials on any petition for court approval. 462 U.S., at 491 n.16 (Opinion of Powell, J.). Surely, the detailed confidentiality provisions governing Section 3206 which are outlined above more than meet constitutional standards.

On the issue of expediency, the new rules require that proceedings under Section 3206 be given precedence over other business and mandate that a decision be reached within three business days of the request for court intervention. Rule 16.7. Any appeal also must be expedited; the record must be perfected within five days after the appeal

is filed and a decision must be reached within seven business days after the record is completed. Rule 16.8. The appellate court is required to assign appeals "to a special submission panel of the court for immediate disposition." Ibid.

It is difficult to imagine how the State court could have done more to ensure that Section 3206 proceedings are concluded quickly, while still leaving sufficient time for the courts to consider such important matters. The provisions approved in Ashcroft were far less generous or as detailed-providing only that a hearing must be held within five days, the record on appeal must be perfected within five days, and court rules should prescribe any further details. 462 U.S., at 480 n.4, 491 n. 16 (Opinion of Powell, J.) Clearly, the specific guidelines for expedition of

Section 3206 proceedings fulfill the requirement for quick resolution of minors' petitions.

The new rules similarly meet the Court of Appeals' remaining concerns. The rules establish a clear and simple procedure for the filing of a petition. Rule 16.1. No filing fees are required. Ibid. The required contents of a petition are set forth in concise terms. Rule 16.2(a). Moreover, court personnel are directed to assist the minor in preparing the petition. Rule 16.2(b).

These new detailed, yet easy to follow, rules governing proceedings under Section 3206 clearly are adequate to satisfy any objections to enforcement of Section 3206. Because "abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained 'on demand,'" H. L. v.

Matheson, 450 U.S. 398, 420, n.8 (1981) (Powell, J., concurring), it is imperative that the special provisions of Section 3206 dealing with abortions for minors be implemented as soon as possible. The judgment of the Court of Appeals should be vacated.

E. The Provision Regarding The Selection Of Abortion Technique For Post-Viability Abortions Is Constitutional Because It Does Not Require Sacrifice Of The Woman's Life Or Health.

The Court of Appeals held unconstitutional Section 3210(b) of the Act, which requires a physician performing an abortion on a viable fetus to use the abortion method most likely to produce a live birth, unless "in the good faith judgment of the physician" that method "would produce a significantly greater medical risk to the life or health of the pregnant woman."[31] The court concluded that this type of provision is invalid only if it requires the pregnant woman to sacrifice her life or health for the viable fetus. J.S. App. 69a. See Colautti v. Franklin, 439 U.S. 379,

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[31]Section 3210(b) is reproduced in the Addendum, at 27a-28a.

400 (1979); see also Ashcroft, 462 U.S., at 485 n.8 (Opinion of Powell, J.) (second-physician requirement for abortion of viable fetus permissible provided pregnant woman's life and health not endangered). But the Court of Appeals failed to follow the lead of the District Court in construing the statute so as to preserve its constitutionality. Compare J.S. App. 70a, with J.S. App. 246a-249a.

The question is whether the term "significantly" should be construed to mean, in the context of this statute, a "meaningful" increased risk (as appellants urged) or a "substantial" increased risk (as appellees argued below). In resolving this question we are guided by the Court's repeated admonition that federal courts are required to construe state statutes in a manner which dispels, not creates, constitutional

problems. Ashcroft, 462 U.S., at 493 (Opinion of Powell, J.); United States v. Harriss, 347 U.S. 612, 618 (1954).

As the district court observed, "Websters' Third New International Dictionary defines significant as 'having meaning,' 'having or likely to have influence or effect,' and 'probably caused by something other than chance.'" J.S. App. 248a. Under this certainly permissible view of the critical term, the statute would not require a sacrifice of the pregnant woman's life or health. The District Court's construction of the statue, which certainly was an appropriate one, properly respected this Court's direction to avoid constitutional problems. The Court of Appeals' ruling, on the other hand, failed to respect this principle.

Moreover, there simply is no evidence that there are alternative post-viability abortion methods with marginal, but not "significant" (as appellees view that term), relative risks to women. In fact, the evidence offered by appellees shows that, when performing abortions on potentially viable fetuses, they have "utilized the procedure most likely to preserve the life of the fetus." App. 48a-49a, ¶182. This rather remarkable admission undercuts entirely appellees' argument, since we must assume that they did not select a relatively dangerous abortion technique.

Finally, it is important to note that the statute requires nothing more of physicians than the performance of an everyday task. They merely are asked, initially, to make a good faith judgment as to the relative risks of available

abortion methods for the particular patient. Presumably, this is the type of judgment physicians must make all the time in a variety of circumstances. The statute comes into play only if there is no meaningful difference in the risks; then the physician must choose the method likely to preserve the fetus.

In summary, the statute, even in the abstract, may be construed to avoid any constitutional problem. Moreover, the evidence on which appellees rely fails to show that their objection is anything more than theoretical. The statute should be upheld.

Conclusion

The judgment of the Court of Appeals should be vacated and the case should be remanded for entry of an appropriate order limited to whether the District Court properly ruled on the preliminary injunction motion. In the alternative, the judgment should be reversed to the extent that the Court of Appeals held provisions of state law to be unconstitutional.

Respectfully submitted,

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ADDENDUM

28 U.S.C. §1254(2) provides as follows:

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * *.

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

RELEVANT SECTIONS OF THE
ABORTION CONTROL ACT

18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983)

§ 3202. Legislative Intent

(a) Rights and Interests. -- It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion. It is the further intention of the General Assembly to foster the development of standards of professional conduct in a critical area of medical practice, to provide for development of statistical data and to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term. The General Assembly finds as fact that the rights and interests furthered by this chapter are

not secure in the context in which abortion is presently performed.

(b) Conclusions. -- Reliable and convincing evidence has compelled the General Assembly to conclude and the General Assembly does hereby solemnly declare and find that:

(1) Many women now seek or are encouraged to undergo abortions without full knowledge of the development of the unborn child or of alternatives to abortion.

(2) The gestational age at which viability of an unborn child occurs has been lowering substantially and steadily as advances in neonatal medical care continue to be made.

(3) A significant number of late-term abortions result in live births, or in delivery of children who could survive if measures were taken to bring about breathing. Some physicians

have been allowing these children to die or have been failing to induce breathing.

(4) Because the Commonwealth places a supreme value upon protecting human life, it is necessary that those physicians which it permits to practice medicine be held to precise standards of care in cases where their actions [redacted] may result in the death of an unborn child.

(5) A reasonable waiting period, as contained in this chapter, is critical to the assurance that a woman elect to undergo an abortion procedure only after having the fullest opportunity to give her informed consent thereto.

(c) Construction. -- In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania

shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.

(d) Right of [redacted] It is the [redacted] Common- [redacted] Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing

to obtain, receive, subsidize, accept or provide abortions.

§3203. Definitions

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Abortion." The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus.

"Born alive." When used with regard to a human being, means that the human being was completely expelled or extracted from her or his mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity.

. . . .

"Facility" or "medical facility." Any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein medical care is provide to any person.

. . . .

"First trimester." The first 12 weeks of gestation.

"Hospital." An institution licensed pursuant to the provisions of the law of this Commonwealth.

. . . .

"Medical emergency." That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

"Medical personnel." Any nurse, nurse's aide, medical school student, professional or any other person who furnishes, or assists in the furnishing of, medical care.

"Physician." Any person licensed to practice medicine in this Commonwealth

. . . .

"Probable gestational age of the unborn child." What, in the judgment of the attending physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed.

"Unborn child." For purposes of this chapter, a human being from fertilization until birth and includes a fetus.

"Viability." That stage of fetal development when, in the judgment of the physician based on the particular facts of the case before him and in light of the most advanced medical technology and information available to him, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

§3205. Informed consent

(a) General rule. -- No abortion shall be performed or induced

except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) The woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion or by the referring physician but not by the agent or representative of either.

(i) The name of the physician who will perform the abortion.

(ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable.

(iii) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the

risks of infection, hemorrhage, danger to subsequent pregnancies and infertility.

(iv) The probable gestational age of the unborn child at the time the abortion is to be performed.

(v) The medical risks associated with carrying her child to term.

(2) The woman is informed, by the physician or his agent, at least 24 hours before the abortion;

(i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

(iii) That she has the right to review the printed materials described in section 3208 (relating to printed information). The physician or his agent shall orally inform the woman that the materials describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. If the woman is unable to read the materials furnished her, the materials shall be read to her. If the woman seeks answers to questions concerning any of the information or materials, answers shall be provided her in her own language.

(3) The woman certifies in writing, prior to the abortion, that the information described in paragraphs (1) and (2) has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (2).

(4) Prior to the performance of the abortion, the physician who is to perform or induce the abortion or his agent receives a copy of the written certification prescribed by paragraph (3).

(b) Emergency. -- Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, if the medical indications supporting his judgment that an abortion is necessary to avert her death.

(c) Penalty. -- Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of

1974." Any other person obligated under this chapter to give information relating to informed consent to a woman before an abortion is performed, and who fails to give such information, shall, for the first offense be guilty of a summary offense and, for each subsequent offense, be guilty of a misdemeanor of the third degree.

(d) Limitation on civil liability. -- Any physician who compiles with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P.L. 390, No. 111), known as the "Health Care Services Malpractice Act."

§3206. Parental consent

(a) General rule. -- Except in the case of a medical emergency

except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa. C.S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In obtaining the consent of the woman's parent or guardian, the physician shall provide them the information and materials specified in section 3205

(relating to informed consent), and shall further obtain from them the certification required by section 3205(a)(3). In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

(b) Unavailability of parent or guardian. -If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

(c) Petition to court for consent. -- If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

(d) Court order. -- If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and

capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

(e) Representation in proceedings. -- The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel and shall, upon her request, provide her with such counsel.

(f) Proceedings confidential. -- Court proceedings under this section shall be confidential and shall be given such precedence over other pending

matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman, but in no case shall the court fail to rule within three business days of the date of application. A court of common pleas which conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting its decision and shall order a sealed record of the evidence to be maintained which shall include its own findings and conclusions.

(g) Coercion prohibited. -- Except in a medical emergency, no parent, guardian or other person standing in loco parentis shall coerce a minor or incompetent woman to undergo an abortion. The court shall grant such relief as may be necessary to prevent such coercion. Should a minor be denied

the financial support of her parents by reason of her refusal to undergo abortion, she shall be considered emancipated for purposes of eligibility for assistance benefits.

(h) Regulation of proceedings. -- No filing fees shall be required of any woman availing herself of the procedures provided by this section. An expedited confidential appeal shall be available to any pregnant woman whom the court denies an order authorizing an abortion. The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition.

(i) Penalty. -- Any person who performs an abortion upon a woman

who is an unemancipated minor or incompetent to whom this section applies either with knowledge that she is a minor or incompetent to whom this section applies, or with reckless disregard or negligence as to whether she is a minor or incompetent to whom this section applies, and who intentionally, knowingly or recklessly fails to conform to any requirement of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be suspended in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974," for a period of at least three months. Failure to comply with the requirements of this section is prima facie evidence of failure to obtain informed consent and of interference with family

relations in appropriate civil actions. The law of this Commonwealth shall not be construed to preclude the award of exemplary damages or damages for emotional distress even if unaccompanied by physical complications in any appropriate civil action relevant to violations of this section. Nothing in this section shall be construed to limit the common law rights of parents.

§3207. Abortion facilities

. . . .

(b) Reports. -- Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, which shall be open to public inspection and copying, containing the following information:

(1) Name and address of the facility.

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership with any other facility.

Any facility failing to comply with the provisions of the subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof.

§3208. Printed information

(a) General Rule. -- The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, the following easily

comprehensible printed materials:

(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall include the following statement:

"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."

(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, non-judgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

. . . .

§3209. Abortion after first trimester

All abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital. Except in cases of good faith judgment that a medical emergency exists, any physician who performs such an abortion in a place other than a hospital is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

§3210. Abortion after viability

(a) Prohibition; penalty. -- Any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree.

It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

(b) Degree of care. -- Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the

unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree.

(c) Second physician. -- Any person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange

for the attendance, to the same room in which the abortion is to be completed, of a second physician. Immediately after the complete explusion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health. Any person who intentionally, knowingly, or recklessly violates the provisions of this subsection commits a felony of the third degree.

§3211. Viability

(a) Determination of viability. -- Prior to performing any abortion upon a woman subsequent to her first trimester of pregnancy, the physician shall determine whether, in his good faith judgment, the child is

viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

(b) Unprofessional conduct. -- Failure of any physician to conform to any requirement of this section constitutes "unprofessional conduct" within the meaning of the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974." Upon a finding by the State Board of Medical Education and Licensure that any physician has failed to conform to any requirement of this section, the board shall not fail to suspend that physician's license for a period of at least three months. Intentional,

knowing or reckless falsification of any report required under this section is a misdemeanor of the third degree.

§3214. Reporting

(a) General rule. -- A report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

(1) Identification of the physician who performed the abortion and the facility where the abortion was performed and of the referring physician, agency or service, if any.

(2) The political subdivision and state in which the woman resides.

(3) The woman's age, race and marital status.

(4) The number of prior pregnancies.

(5) The date of the woman's last menstrual period and the probable gestational age of the unborn child.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Complications, if any, including but not limited to rubella disease, hydatid mole, endocervical polyp and malignancies.

(8) The information required to be reported under section 3211(a) (relating to viability).

(9) The length and weight of the aborted unborn child when measurable.

(10) Basis for any medical judgment that a medical emergency existed as required by any part of this chapter.

(11) The date of the medical consultation required by section 3204(b) (relating to medical consultation and judgment).

(12) The date on which any determination of pregnancy was made.

(13) The information required to be reported under section 3210(b) (relating to abortion after viability).

(14) Whether the abortion was paid for by the patient, by medical assistance, or by medical insurance coverage.

(b) Completion of report. -- The reports shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the department within 15 days after each reporting month.

(c) Pathological examinations. -- When there is an abortion performed during the first trimester of pregnancy, the tissue that is removed shall be subjected to a gross microscopic examination, as needed, by the physician

or a qualified person designated by the physician to determine if a pregnancy existed and was terminated. If the examination indicates no fetal remains, that information shall immediately be made known to the physician and sent to the department within 15 days of the analysis. When there is an abortion performed after the first trimester of pregnancy where the physician has certified the unborn child is not viable, the dead unborn child and all tissue removed at the time of the abortion shall be submitted for tissue analysis to a board eligible or certified pathologist. If the report reveals evidence of viability or live birth, the pathologist shall report such findings to the department within 15 days and a copy of the report shall also be sent to the physician performing the abortion. Intentional, knowing, reckless

or negligent failure of the physician to submit such an unborn child or such tissue remains to such a pathologist for such a purpose, or intentional knowing or reckless failure of the pathologist to report any evidence of live birth or viability to the department in the manner and within the time prescribed is a misdemeanor of the third degree.

(d) Form. -- The department shall prescribe a form on which pathologists may report any evidence of absence of pregnancy, live birth or viability.

(e) Statistical reports; public availability of reports. --

(1) The department shall prepare an annual statistical report for the General Assembly based upon the data gathered under subsection (a). Such report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed,

and shall be available for public inspection and copying.

(2) Reports filed pursuant to subsection (a) shall not be deemed public records within the meaning of that term as defined by the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law, but shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report. On those reports available for public inspection and copying, the department shall substitute for the name of any physician which appears on the report, a unique identifying number. The identity of the physician shall constitute a confidential record of the department. The department may set a reasonable per copy fee to cover the cost of making any copies authorized hereunder.

(3) Original copies of all reports filed under subsection (a) shall be available to the State Board of Medical Education and Licensure and to law enforcement officials, for use in the performance of their official duties.

(4) Any person who willfully discloses any information obtained from reports filed pursuant to subsection (a), other than that disclosure authorized under paragraph (1), (2) or (3) hereof or as otherwise authorized by law, shall commit a misdemeanor of the third degree.

(f) Report by facility. -- Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also

show the total abortions performed in each trimester of pregnancy. These reports shall be available for public inspection and copying.

(g) Report of maternal death. -- After 30 days' public notice, the department shall henceforth require that all reports of maternal deaths occurring within the Commonwealth arising from pregnancy, childbirth or intentional abortion in every case state the cause of death, the duration of the woman's pregnancy when her death occurred and whether or not the woman was under the care of a physician during her pregnancy prior to her death and shall issue such regulations as are necessary to assure that such information is reported, conducting its own investigation if necessary in order to ascertain such data. A woman shall be deemed to have

been under the care of a physician prior to her death for the purpose of this chapter when she had either been examined or treated by a physician, not including any examination or treatment in connection with emergency care for complications of her pregnancy or complications of her abortion, preceding the woman's death at any time which is both 21 or more days after the time she became pregnant and within 60 days prior to her death. Known incidents of maternal mortality of nonresident women arising from induced abortion performed in this Commonwealth shall be included as incidents of maternal mortality arising from induced abortions. Incidents of maternal mortality arising from continued pregnancy or childbirth and occurring after induced abortion has been attempted but not completed, including deaths occurring after induced

abortion has been attempted but not completed as a result of ectopic pregnancy, shall be included as incidents of maternal mortality arising from induced abortion. The department shall annually compile a statistical report for the General Assembly based upon the data gathered under this subsection, and all such statistical reports shall be available for public inspection and copying.

(h) Report of complications. -- Every physician who is called upon to provide medical care or treatment to a woman who is in need of medical care because of a complication or complications resulting, in the good faith judgment of the physician, from having undergone an abortion or attempted abortion shall prepare a report thereof and file the report with the department within 30 days of the

date of his first examination of the woman, which report shall be open to public inspection and copying and shall be on forms prescribed by the department, which forms shall contain the following information, as received, and such other information except the name of the patient as the department may from time to time require:

(1) Age of patient.

(2) Number of pregnancies patient may have had prior to the abortion.

(3) Number and type of abortions patient may have had prior to this abortion.

(4) Name and address of the facility where the abortion was performed.

(5) Gestational age of the unborn child at the time of the abortion, if known.

(6) Type of abortion performed, if known.

(7) Nature of complication or complications.

(8) Medical treatment given.

(9) The nature and extent, if known, of any permanent condition caused by the complication.

(i) Penalties. --

(1) Any person required under this section to file a report, keep any records or supply any information, who willfully fails to file such report, keep such records or supply such information at the time or times required by law or regulation is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

(2) Any person who willfully delivers or discloses to the department any report, record or information known by him to be false commits a misdemeanor of the first degree.

(3) In addition to the above penalities, any person, organization or facility who willfully violates any of the provisions of this section requiring reporting shall upon conviction thereof:

(i) For the first time, have its license suspended for a period of six months.

(ii) For the second time, have its license suspended for a period of one year.

(iii) For the third time, have its license revoked.

§3215. Publicly owned facilities; public officials and public funds.

. . . .

(e) Insurance policies. -- All insurers who make available health care and disability insurance policies in this Commonwealth shall make available such policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest. Any such policy shall contain a premium which is lower than that which is contained in policies offering additional abortion coverage.

. . . .

The severability clause of the Pennsylvania Abortion Control Act provides, as follows:

> The provisions of this act shall be severable. If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of this act, and the application of any provision hereof to any other persons or circumstances, shall not be affected thereby.

Act No. 1982-138, §5, 1982 Pa. Legis. Serv. 750, 794 (Purdon).

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: PROMULGATION OF NEW ORPHANS' COURT RULE 16 GOVERNING PROCEEDINGS PURSUANT TO SECTION 3206 OF THE ABORTION CONTROL ACT AND RENUMBERING OF PRESENT ORPHANS' COURT RULE 16	:NO. 198 E.D. :MISC. DOCKET :1984 : : : : :

O R D E R

AND NOW, this 26th day of November, 1984, new Orphans' Court Rule 16 is promulgated as attached hereto and present Orphans' Court Rule 16 is hereby renumbered as Orphans' Court Rule 17.

To the extent that notice of proposed rule making would be required by Rule 103 of the Pennsylvania Rules of Judicial Administration or otherwise, the immediate adoption of the new Rule and renumbering are hereby found to be required in the interest of justice.

The Rule and renumbering shall be effective immediately.

BY THE COURT:

Chief Justice

Mr. Justice Flaherty and Mr. Justice Papadakos dissent.

Rule 16. Proceedings Pursuant to Section 3206 of the Abortion Control Act

The right of a minor to petition the court for consent under Section 3206(c), 18 Pa.C.S. §3206(c), shall be carried forth pursuant to the following procedures:

16.1. Filing

A petition or motion to the court of common pleas seeking authorization for a physician to perform an abortion shall be filed in the Orphans' Court Division except in Philadelphia, where cases involving minors shall be heard in the Family Court Division. No filing fees shall be required of any pregnant minor woman filing such a petition or motion.

16.2. Contents of Petition

(a) The petition shall be verified by way of a notarized affidavit stating

that the information therein is true and correct to the best of the minor's knowledge, and the petition shall set forth the following facts:

(1) the initials of the minor;

(2) the age of the minor;

(3) the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor;

(4) that the minor has been fully informed of the risks and consequences of the abortion;

(5) that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion;

(6) a prayer for relief asking the court to either grant the minor majority rights for the purpose of personal consent to the abortion, or to give judicial consent to the abortion under 3206(d) based upon a finding that the abortion is in the best interest of the minor; and

(7) the signature of the minor.

(b) where necessary to serve the interest of justice, the Orphans' Court Division, or in Philadelphia the

Family Court Division, shall refer the minor the appropriate personnel for assistance in preparing the petition.

16.3. Representation in Proceedings

The pregnant minor woman may participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem for her.

The court shall advise the pregnant minor woman that she has a right to court-appointed counsel and shall, upon her request, provide her with such counsel.

The court also shall advise her that she has a right to retain private counsel at her own expense.

16.4. Proceedings Confidential

All proceedings conducted in accordance with these rules and pursuant to 18 Pa. C.S. §3206 shall be confiden-

tial. The name of the pregnant woman shall not be entered on any docket which is subject to public inspection. All persons shall be excluded from the hearings except the applicant, her parents or persons standing in loco parentis, and such other persons whose presence is specifically requested by the applicant or her guardian.

16.5. Relevant Evidence

At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to the abortion, and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether

the abortion is in the best interest of the minor.

16.6. Confidential Record Keeping

The court shall make in writing specific findings of fact and conclusions of law supporting its decision and shall order a sealed record of the evidence to be maintained. The sealed record shall include the court's findings and conclusions.

All pleadings, briefs, orders, transcripts, exhibits and any other written or recorded material involved in or a part of such proceeding shall be impounded. The identity of the applicant shall not be disclosed in any reported decision under Section 3206.

16.7. Expediency

Proceedings in accordance with these rules and pursuant to 18 Pa. C.S.

§3206 shall be given such precedence over other pending matters as to ensure that the court will reach a decision promptly and without delay but in no case shall the court fail to rule within three business days of the date of filing.

16.8. Right to Appeal

An expedited confidential appeal to the Superior Court shall be available to any pregnant woman whom the court denies an order authorizing an abortion. The notice of intent to appeal shall be given within forty-eight hours of the date of issuance of the order. The record on appeal shall be perfected within five business days from the filing of notice of appeal. The President Judge shall assign all appeals taken pursuant to this Rule to a special submission panel of the court for

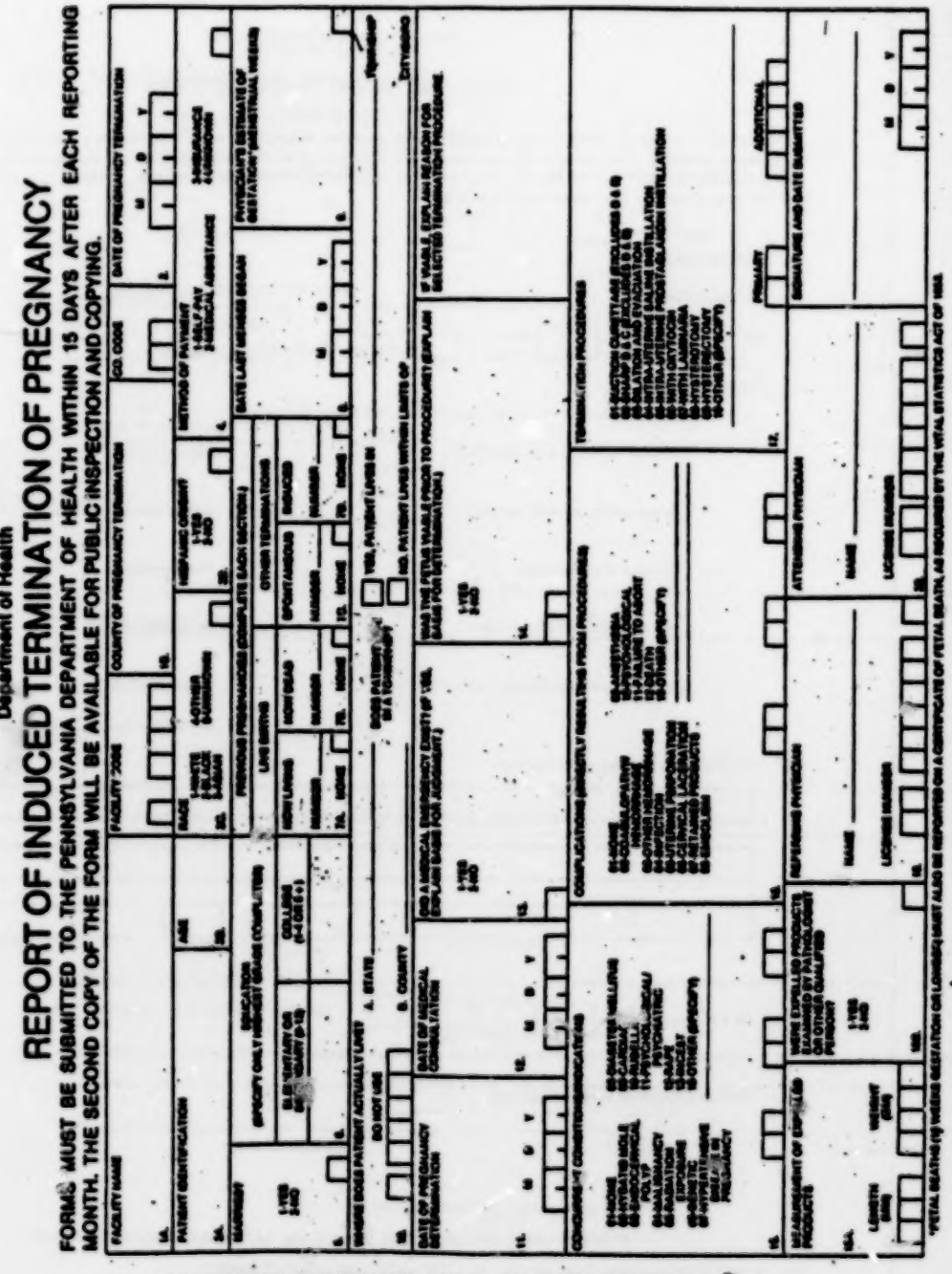
immediate disposition. In no case shall the court fail to rule on the appeal within seven business days of the completion of the record.

File No.

COMMONWEALTH OF PENNSYLVANIA
Department of Health

REPORT OF INDUCED TERMINATION OF PREGNANCY

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH. THE SECOND COPY OF THE FORM WILL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING.



HCSS-2000 (11/82) PAGE 1 OF 2

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

ABORTIONS: REPORT OF COMPLICATIONS

Effective December 8, 1982, every physician who provides medical care or treatment to a woman because of complications resulting from an abortion or attempted abortion must file a report with the Bureau of Quality Assurance, Pennsylvania Department of Health, P.O. Box 90, Harrisburg, Pennsylvania 17108. Reports are due within 30 days of the date physician first examines the woman.

1. Age of patient: ☐

2. Previous pregnancies:

Live Births		Other Terminations	
☐ Now Living	☐ Now Dead	☐ Spontaneous	☐ Induced

a. If previous induced termination(s), type of procedure (check all that apply):

Suction curettage (excludes D&E)	☐	With amniotomy	☐
Sharp curettage (excludes D&E)	☐	With laminaria	☐
Dilation and Evacuation	☐	Hysterotomy	☐
Intra-uterine Saline Instillation	☐	Hysterectomy	☐
Intra-uterine Prostaglandin Instillation	☐	Other (specify)	☐

3. Facility where abortion was performed:

NAME

STREET

POST OFFICE STATE ZIP CODE

4. Date of abortion: ☐☐ MO ☐☐ DAY ☐☐ YR.

5. Estimated menstrual weeks of gestation: ☐

HCSS-2000 (11/82) ABORTIONS: REPORT OF COMPLICATIONS PAGE 2 OF 2

6. Type of termination procedure (check all that apply):

Suction curettage (excludes D&E)	☐	With amniotomy	☐
Sharp curettage (excludes D&E)	☐	With laminaria	☐
Dilation and Evacuation	☐	Hysterotomy	☐
Intra-uterine Saline Instillation	☐	Hysterectomy	☐
Intra-uterine Prostaglandin Instillation	☐	Other (specify)	☐

7. Nature of complication or complications:

8. Medical treatment given:

9. Nature and extent of any permanent condition caused by the complication:

10. Date of first examination of patient: ☐☐ MO ☐☐ DAY ☐☐ YR.

Physician's Signature | License No. | Date Submitted

[Pa. B. Doc. No. 82-1787. Filed December 3, 1982, 3:03 p.m.]

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH, et al.,

Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees

On Appeal From The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR APPELLANTS

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On Appeal From the United States Court of Appeals For The Third Circuit

REPLY BRIEF FOR APPELLANTS

ARGUMENT

I. THE POLICIES UNDERLYING 28 U.S.C. §1254(2) SUPPORT THE CONCLUSION THAT THE STATUTE IS NOT LIMITED TO FINAL JUDGMENTS.

In resisting our argument that this case properly was appealed to this Court under 28 U.S.C. §1254(2), appellees rely upon the general rule favoring finality as a prerequisite to appellate jurisdiction and the rule's foundation - the policy of avoiding piecemeal review. In our main brief we have shown, in an argument not refuted by appellees, that certain overriding policies have, on occasion, moved Congress to permit interlocutory appeals despite the recognition that the result could be piecemeal review. It is the overriding policy of providing an avenue for mandatory, expeditious review by this Court which informs resolution of the jurisdictional issue here.

Appellants seem to argue (Appellees' Br. 8-9), relying upon McLish v. Roff, 141 U.S. 661 (1891), that the absence of an express finality requirement in Section 1254(2) mandates a conclusion that finality is required. To be sure, McLish held that finality was required for appellate jurisdiction even though the statute under examination there contained no express finality language.[1] But the Court in that case found no identifiable policy which contradicted the general rule of

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[1] McLish construed a provision granting direct appellate review in the Supreme Court in cases involving jurisdictional questions. Section 5 of Act of March 3, 1891, 26 Stat. 826, 827.

finality. By contrast, the history and purpose of Section 1254(2) demonstrate the importance of according it a broad reach and in not applying the general rule of finality.[2]

In the early 1920's the Court submitted to Congress draft legislation for altering the Court's jurisdiction. That proposal became the centerpiece for the Judiciary Act of 1925, 43 Stat. 936. The main purpose of the Court's proposal was to restrict severely the

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[2]We certainly do not dispute appellees' point that Congress is presumed to be aware of this Court's decisions. It stretches this principle beyond its breaking point to suggest, however, that the presumed knowledge of McLish requires the conclusion that finality is required in every case in which there is no mention of the requirement. This would render as surplusage Congress' repeated use of explicit finality language.

Court's obligatory appellate jurisdiction. Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 310-311 (1978); F. Frankfurter and J. Landis, The Business of the Supreme Court, 260-261 (1928). But although Congress accepted the Court's central thesis of restricting obligatory review, it insisted upon an important amendment to the Court's plan - the creation of mandatory appellate jurisdiction over cases in which a court of appeals has decided against a state statute on constitutional grounds. Section 240(b), 43 Stat. 938. Thus, the Judiciary Act of 1925, while generally restricting the Court's mandatory jurisdiction, reflected Congressional recognition of the

"important issues of federalism which arise. . . when a federal court strikes down a state law." Simpson, supra, at 313.[3]

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[3]Appellees place far too much reliance (Appellees' Br. 9-10) on the comments by several Senators that former Section 240(b) was intended to be on "parity" with former Section 237(a) (now 28 U.S.C. §1257) which gave the Court mandatory jurisdiction over final judgments of state courts holding federal laws unconstitutional or rejecting constitutional challenges to state laws. As Frankfurter and Landis point out, parity between these provisions was not achieved in a number of respects. Frankfurter and Landis, supra, at 286 n.118. Moreover, it must be remembered that, pursuant to the Judiciary Act of 1925, the Court had no jurisdiction to review any non-final state court decisions. Section 237, 43 Stat. 937-938. By that same Act, Congress did, however, give the Court jurisdiction to hear by appeal or certiorari a wide variety of interlocutory questions coming from federal courts. Sections 238, 239, 240, 43 Stat. 938-939. Considerations of finality are far more important under Section 1257 because

FOOTNOTE CONTINUED

The Congress' strong concerns for federalism distinguish the provision under review here from the statute examined in McLish.[4] It may be that the omission of an explicit finality requirement, standing alone, permits a conclusion that finality is required.

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

of the strong policy of "minim[izing] federal intrusion in state affairs." North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159 (1973); see also Republic Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948).

[4]Even where finality is expressly required for there to be appellate jurisdiction, the Court has not "administered" that requirement in a "mechanical fashion." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975). In the present case, many of the same considerations which support the view that finality is not required also would justify a flexible construction of the finality requirement which

FOOTNOTE CONTINUED

But when the substantive policies underlying the jurisdictional provision support interlocutory review, those policies together with the absence of a finality provision compel the conclusion that interlocutory appeal is permitted.[5]

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

permits an appeal from a decision of a court of appeals striking down some provisions of state law and remanding for further proceedings on other related statutory provisions.

[5]Repeal of the three-judge court provisions, 90 Stat. 1119, is consistent with an expansive construction of Section 1254(2). Repeal of those statutes was designed primarily to relieve the lower federal courts from the burdens imposed when three judges, one of which was a circuit judge, were required to hear a case and to remove the uncertainties of three-judge court practice. S. Rep. No. 94-204, 3-4

FOOTNOTE CONTINUED

Recently, the Court applied similar principles in holding that a decision granting a preliminary injunction against enforcement of an act of Congress was appealable under 28 U.S.C. §1252. Walters v. National Association of Radiation Survivors, No. 84-571 (June 28, 1985). As initially enacted, Section 1252, like the original version of Section 1254(2), 43 Stat. 939, permitted an appeal if the decision was "against" the statute. The Court in Walters held that a preliminary assessment of the merits certainly was

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

(1975). In endorsing repeal of these provisions, Congress evidently was confident that an appeal to this Court after review by a court of appeals would safeguard adequately the interests of federalism. See S. Rep. 94-204, supra, at 10.

"against" the validity of the statute. Slip op, at 12. As the Court noted, Section 1252 is an exception to the general policy of minimizing the Court's obligatory jurisdiction. The policies identified by Congress in passing Section 1252 are frustrated "by an interlocutory decision . . . in the short run just as surely as a final decision to that effect." Walters, slip op, at 13. Although Section 1254(2) is less explicit than Section 1252 in providing for non-final review, the analysis in Walters is supportive of a generous construction of Section 1254(2).[6]

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[6]The Court has construed Section 1254(2) narrowly in the sense that the decision under review must expressly strike down a state statute. Silkwood

FOOTNOTE CONTINUED

For these reasons and those set forth in our main brief, the Court should accept jurisidication over this appeal.

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

v. Kerr-McGee Corp., 464 U.S. 238, 246-247 (1984); Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 42-43 (1983); Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n.1 (1970). But unlike Silkwood, Perry and Fornaris, this case concerns an express decision striking down state statutes. Although it certainly is understandable that the Court has chosen to limit the statute strictly to those types of cases important enough to warrant obligatory review, it would subvert the purpose of the appeal statute to deny an appeal from a decision precisely within the evil addressed by Congress.

II. AT THIS STAGE OF THE PROCEEDINGS THE COURT MAY UPHOLD THE STATE STATUTES BEFORE THE COURT, BUT IT MAY NOT AFFIRM THE COURT OF APPEALS' DECISION STRIKING DOWN THE STATUTES.

In our main brief we discussed at length the authority and rationale which supports our position that, given the procedural posture of the case and the record created below, the statutes may be upheld, but not finally declared unconstitutional.

In opposing our argument that the statutes may not be stricken at this stage of the proceedings, appellees say only that "no set of facts could alter the result." Appellees' Br. 14.[7] One would expect appellees to take this

[7]Appellees do not dispute our contention that, from their standpoint, the record is complete for purposes of a ruling on the statutes before the Court.

position and also to denigrate the short explanation in our main brief of some of the evidence we will present at trial if the statutes are not upheld. But no rule of law supports an appellate court's right to conclude in the first instance, contrary to a party's wishes, that a trial would serve no purpose. Elementary considerations of fairness dictate a result contrary to the position taken by appellees.

III. THE STATUTES BEFORE THE COURT ARE CONSTITUTIONAL.

A. The Reporting Requirements Serve Important Health Objectives And Properly Respect Confidentiality

Appellees attack the reporting requirements of 18 Pa. Cons. Stat. Ann. §3214 (Purdon 1983) on two tacks - first, they argue that these provisions do not respond to "important health-related concerns"; and, secondly, they claim that the provisions do not adequately protect the confidentiality of patients and physicians. Appellees' Br. 40-41. Neither contention withstands analysis.

1. The health basis for the reporting requirements is obvious - if abortion is to be studied and made safer, there must be data upon which to base future studies. Appellees acknowledge this obvious point, but stress instead that some of the information

requested by Pennsylvania is not required on reports made to the Centers for Disease Control. Appellees' Br. 40-41 n.39.

The differences between Pennsylvania's report and the information gathered by the CDC is based largely on Pennsylvania's use of this report to aid with enforcement of the statutory provisions. See 18 Pa. Cons. Stat. Ann. §3214(a)(8)-(11), (13). It hardly can be argued that, with this factor taken into consideration, the reports depart from appropriate medical purposes.[8] Moreover, information on

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[8]In fact, amici American Medical Association and other associations of medical professionals do not challenge the reporting provisions, except to the extent that physicians must report the basis for certain medical judgments. Brief of American Medical Association, et al., at 46-47.

the basis for physicians' judgments on viability and choice of abortion method provide the research community with difficult to find information on late-term abortions. See Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 263-265 (1984).

2. Appellees' other contention (Appellees' Br. 41-43) seems to be that confidentiality is not assured thereby risking violence to patients and physicians. But the statute explicitly mandates confidentiality both for patients and physicians. 18 Pa. Cons. Stat. Ann. §3214(a), (e) (Purdon 1983). The reports may not identify the patient, nor may the reports released to the public "lead to the disclosure of any

person filing a report." Section 3214(e)(2). Unauthorized disclosure carries criminal penalties. Section 3214(e)(4).

Appellees' specific protestations are rather far-fetched. Appellees' Br. 42 n.41. If the abortion facility is a doctor's office, facility information will be deleted from the public reports since that information would "lead to the disclosure" of the person filing the report. Appellees' hypothesis regarding the ability of someone to piece together fragmentary bits of personal information and so to identify the patient is without credence. It is difficult to believe that anyone, even the most zealous opponent of abortion, would go to the extreme efforts described by appellees. This possibility is particularly remote when it is remembered that abortion

clinics are visable establishments which provide more than sufficient opportunities for "sidewalk counselors" to address abortion patients without the need for extraordinary detective work.[9]

B. The State Is Permitted To Insure That Women Are Provided With Relevant Information Before They Decide Whether To Have An Abortion.

In our initial brief we outlined in detail the bases, both legal and logical, for each category of information described in 18 Pa. Cons. Stat. Ann. §3205(a) (Purdon 1983).

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[9]In a rather confusing discussion, appellees claim that the requirement for filing of maternal death reports (18 Pa. Cons. Stat. Ann. §3214(g) (Purdon 1983)) was enjoined by the Court of Appeals, but is "nevertheless objectionable." Appellees' Br. 37 n.36. Not only was this provision not enjoined, the Court of Appeals noted that it was unchallenged in that court. J.S. App. 82.

Appellees, rather than contesting these points, have chosen instead to argue that the provisions are impermissably coercive and that the state may not in any case specify the types of information which must be provided to patients if their consent to a surgical procedure is to be truly informed.[10] Appellees' Br. 12-23. Neither of these arguments stand up to close scrutiny.

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[10]Amici American Civil Liberties Union, et al. argue against the requirement that women be informed that some risks of abortion are not "accurately forseeable," 18 Pa. Cons. Stat. Ann. §3205(a)(iii) (Purdon 1983) because, they say, no risks are unforseeable. Br. 18. This point is refuted by amici Planned Parenthood Federation of America, et al., who point out that "medical evidence is quite inconclusive" on some of the risks of abortion. Br. 7.

1. In arguing that the information described in Pennsylvania's statute is designed to discourage women from obtaining abortions appellees overlook the crucial purpose of informed consent requirements - patients are entitled to information which may affect their decision whether to submit to a medical procedure. If the required information would not have an effect - namely, encouraging some and discouraging others to follow through with treatment - then this process would be meaningl s.

Un e the ordinance which the Court examine City of Akron v. Akron Center For R roductive Health, Inc., 462 U.S. 416 (1983), the Pennsylvania statute steers clear of "dubious statements" and an obvious "parade of horribles." Id., at 444-445. To be

sure, contemplation of an abortion may be stressful and that concern may be heightened by a discussion of potential consequences from the procedure. The same can be said about any medical procedure. But the stress which we all feel when medical treatment is contemplated and the accompanying difficulty in carefully examining the available options underscores the need for a requirement that relevant information be provided to the patient. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976). Viewed in this way, appellees' objections to the statute melt away.

A scientifically accurate description of fetal characteristics may cause anxiety, but if the woman chooses to review this optional material there is no justification for withholding it.

The agencies listed in the optional materials might include some whose philosophy does not coincide with that held by clinic employees, but it is for the woman, not the clinic personnel, to decide where she will seek help. The suggestions that medical assistance benefits and support payments may be available, if presented properly as the statute plainly permits, should serve only better to inform the woman's decision.

Appellees' opposition to the medical information requirements shows little faith in women and in the professional personnel at abortion facilities. We are confident that physicians and counsellors can present information regarding the known medical risks of abortion and the possibility of unforseeable risks in a manner which

helps their patients to make a truly informed decision.[11] Appellees' concern with the potential for confusion is no more than unsupported speculation that professionals cannot present relevant, somewhat technical information in a manner understandable to the layman. This argument falls of its own weight.

2. Appellees apparently do not oppose entirely the idea of informed consent, but they argue that any state structuring of this interchange - however general and open-ended the requirements may be - violates the rule which requires that professionals be

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[11]While appellees may be correct that the statute requires the disclosure of all risks (appellees' Br. 23), the statute permits the physician or counsellor to place this information in its proper perspective.

given flexibility in conducting the informed consent dialogue. See City of Akron, 462 U.S., at 445. But whatever may be the wisdom in other contexts of permitting physicians and counsellors a completely free hand in deciding what to discuss with patients, the abortion situation presents a compelling case for some general requirements.

The Pennsylvania Legislature found that many women are encouraged to obtain abortions without being provided with complete information. 18 Pa. Cons. Stat. Ann. §3202(b)(1). The record in this case reflects that women are not always provided with information relevant to the abortion decision - information which, had it been provided as required by the statute, would have altered their decision to have an abortion. J. App. 44a. The failures of

abortion facilities and referral agencies to balance the information provided to pregnant women has been well-chronicaled. See The Abortion Profiteers, Chicago Sun-Times 2-3, 20-22 (Special Reprint 1978).

We agree that the statute provides "strong incentives for compliance," but it is unreasonable for appellees to suggest that they will be forced to give women information "that tracks the statutory language precisely, without elaboration." Appellees' Br. 23. If the physician or counsellor complies with the general provisions of the statute, he or she is free to explain the significance of this information in any way which is appropriate.

Pennsylvania has responded to the very real problem created by the refusal of some abortion providers to present necessary information to women considering abortion. Pennsylvania's response is general enough to permit appropriate counseling and specific enough to serve the permissible purpose of insuring that women are apprised of the nature and consequences of their choice, and the alternatives available to them. The statute strikes the appropriate balance and should be upheld.

C. There Is Still A Live Controversy Concerning The Parental Consent/Judicial Approval Provisions And The Rules Governing Judicial Proceedings Are Valid.

The Court of Appeals upheld the statutory provisions governing parental consent or judicial approval for minors' abortions, 18 Pa. Cons. Stat. Ann. §3206 (Purdon 1983), but ordered the statute

enjoined anyway because the state Supreme Court had not issued rules for judicial approval proceedings. J.S. App. 50a-52a, 56a. In our main brief we argued first that no implementing rules were required, and second, that the rules issued after the Court of Appeals' decision satisfy that court's concerns. Appellees do not mention our first point. Instead they argue that this issue is moot and that, in any event, the rules are insufficient to allay constitutional concerns.

1. The controversy between the parties concerns the constitutionality of 18 Pa. Cons. Stat. Ann. §3206 (Purdon 1983). Appellants continue to defend this provision and appellees have not conceded its validity. Plainly, the new rules did not terminate this controversy. A question is moot only if (1) there is no likelihood that "the

alleged violation will recur and (2) interim relief or events have completely and irrevocably erradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (citations omitted). Under this test, the claim against Section 3206 is not moot.

In fact, it is somewhat ironic that appellees argue mootness for they hardly contend that interim events - the issuance of new state procedural rules - "erradicated the effects of the alleged violation." Rather, appellees have confused the concept of mootness, a jurisdictional rule grounded in the Article III case or controversy requirement,[12] with the Court's prudential

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[12] See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-603 (1982); United States Parole Commission v. Geraghty, 445 U.S. 388, 395-397 (1980).

decisions whether to address a pending claim in light of recent developments.

Appellees refer to several cases in which the Court has declined to address claims which have been affected by intervening changes in the law. Appellees' Br. 44. In many other cases, the Court has considered the claim before it in light of statutory or regulatory changes made after the decision under review. See California Bankers Association v. Schultz, 416 U.S. 21, 49-50 n.21 (1974); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281-282 (1969); Carpenter v. Wabash Railway Co., 309 U.S. 23, 26-27 (1940); American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 201 (1921); Crozier v. Krupp, 224 U.S. 290, 302-306 (1912); Dinsmore

v. Southern Express Co., 183 U.S. 115, 120-121 (1901). Although appellees seem to suggest that a remand is necessary to permit development of a factual record (Appellees' Br. 44), their arguments and the order below are based solely on the law. They suggest no facts which support additional arguments which they now wish to make. Thus, this claim may be rejected and the lower court order reversed.

2. In the Court of Appeals, appellees argued that Section 3206 must be enjoined because there were no rules guranteeing confidentiality, preventing delay, describing the petition process or outlining the evidence a court was to consider. See Supplemental Brief for Appellants in the Court of Appeals, 20-22. The Court of Appeals held that regulations were necessary to ensure

confidential, expedited proceedings; to establish a simple procedure for court approval; and to require court personnel to assist the minor. J.S. App. 54a. In light of the new rules, appellees still complain about delay, but they have shifted the main focus of their argument to complaints regarding parental involvement, appointment of counsel and the appropriate role for guardians ad litem. Appellees' Br. 46-48.

As to the delay claim, we have addressed that issue fully in our main brief. Appellants' Br. 80-81. Moreover, the Court may reject the remaining claims without requiring the District Court to first to pass on them.

Appellees mischaracterize the rules as giving a minor's parents "an absolute right to attend the hearing." Appellees Br. 46. In fact, the rules provide only that parents are among

those who are not absolutely excluded from attendance in all cases. See Orphan's Court Rule 16.4, Addendum 51a. In Bellotti v. Baird, 443 U.S. 622, 642 (1979), a plurality of the Court approved of limited parental involvement in judicial authorization proceedings.[13] In the case of an immature minor, a court may conclude that the minor's best interests would be served by "parental consultation in which the court may participate." Ibid. Neither Pennsylvania's statute nor its rules provide for parental notification and we safely may assume that, in conducting hearings,

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[13]In later cases, the Court has followed the plurality opinion in Bellotti. See City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 439-441 (1983); Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 490-493 (1983) (Opinion of Powell, J.).

the state courts will adhere to the limits on parental involvement announced by this Court.

Appellees' arguments regarding appointment of counsel and guardians ad litem are contradictory. They argue that the rules are deficient for not requiring counsel in every case and in permitting participation of a guardian in all cases. It is inconceivable that Pennsylvania's Orphans' Courts and the Family Court in Philadelphia, experienced as they are in dealing with the legal problems of minors, will be unable properly to determine, in conjunction with the minor, her need for counsel and the proper role for her guardian. This Court has provided the state courts with

ample direction in how to deal with minors seeking abortions. Pennsylvania's rules are consistent with the Court's directives and, together with the statute, provide a constitutional procedure for parental consent or judicial approval.

D. The Provisions Of Pennsylvania Law Regulating The Choice Of Abortion Method And Standard Of Care For Post-Viability Abortions Are Constitutional.

Pennsylvania's statute offers limited protection to the viable fetus - the abortion method least risky to the fetus must be used unless it would be significantly riskier to the mother than another available method; and, the physician is to treat the aborted fetus with the care he would extend to any

other person in like circumstances. 18 Pa. Cons. Stat. Ann. §3210(b) (Purdon 1983). Appellees' primary challenge to this statute (and the one accepted by the Court of Appeals) is that the use of the term "significantly" in the statute requires that the woman bear some additional risk. We have dealt with this question in our main brief and will not repeat that analysis here. Appellees' other challenges to this provision deserve only brief comment.

1. Appellees claim that the choice of method requirement is void for vagueness because it requires physicians to make "uncertain judgment calls." Appellees' Br. 28. What appellees fail to appreciate is that the statute requires no more of the physician than that he exercise his best medical judgment in determining viability and

selecting the appropriate abortion method. See 18 Pa. Cons. Stat. Ann. §§3203 ("viability"), 3210(a) and (b). The Pennsylvania Legislature certainly appreciated the fact that the practice of medicine is as much an art as it is a science. So long as physicians exercise their good-faith judgment in determining viability and assessing the risks of particular abortion methods they will comply with the statute.[14] The state permissably "may choose to provide safeguards for the comparatively few instances [in which] live birth [may] occur." Ashcroft, 462 U.S., at 486. This includes a requirement that the

[14]Amici American Medical Association, et al. point out that physicians are aware of the relative riskiness of late-term abortions and the health contraindications for the various common methods. See A.M.A. Br. 35-38.

medical judgment of the physician be exercised with the viable fetus, as well as the woman, in mind. See ACOG Statement of Policy, "Further Ethical Considerations In Induced Abortion" (December, 1977), p.4 ("inducing abortion in no way implies that the physician has an adversary relationship towards the fetus . . . the physician does not view the destruction of the fetus as the primary purpose of abortion").

2. Section 3210(b) requires the physician performing an abortion on a viable fetus to provide the fetus with the degree of care given to a fetus when the intention is to produce a live birth. Appellees claim that this provision is unconstitutionally vague because it does not "specify particular

actions that a physician must take in order to meet the standard of care." Appellees' Br. 33. Again the statute leaves the physician with the room necessary to exercise his best medical judgment. Presumably, if the statute was as specific as appellees suggest, they would argue that it leaves physicians with too little room to exercise their best medical judgment.

Appellees also reiterate the argument, made in opposition to the second-physician requirement, that the absence of a clear maternal life or health exception condemns the standard of care requirement. Appellees' Br. 33-34. Without repeating at length the argument which we have made earlier (Appellants' Br. 56-58), it is sufficient to note that Section 3210 includes

an exception to all of its requirements if measures dangerous to the fetus are "necessary to preserve material life or health." 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983).

CONCLUSION

For these reasons and those set forth in our initial brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 84-495

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

RICHARD THORNBURGH

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, WITH BRIEF AMICUS CURIAE, BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

The Court is moved for leave to file the attached brief amicus curiae by The Legal Defense Fund for Unborn Children.

The amicus brief is not in support of either party. The purpose of the amicus brief is to defend the constitutional right to life of the unborn, which the parties have not done.

The amicus demonstrates that Roe v. Wade, 410 U.S. 113 (1973) is a mistake of law.

Although amicus addresses no arguments to the issues raised by the parties, the facts and authorities presented by the amicus disposes of all the issues raised by the parties.

Alan Ernest
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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1984

RICHARD THORNBURGH

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, PENNSYLVANIA SECTION

AMICUS CURIAE BRIEF BY THE LEGAL DEFENSE
FUND FOR UNBORN CHILDREN

INTEREST OF AMICUS CURIAE

The interest of the Legal Defense Fund For Unborn Children is to defend the right to life of unborn children under the U.S. Constitution. The parties have not done this. This brief does not support either party.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), is void. It is no law at all.

In Roe v. Wade, the Court decreed: "MASS MURDER IS LIBERTY." This is the ultimate lawless act. In his novel, "1984," Orwell described how a tyranny defrauded its

subjects into obedience with the "doublethink" slogan, "FREEDOM IS SLAVERY." Although this science fiction may appear improbable, the Supreme Court has defrauded this nation into obedience with the ultimate fraud, "MASS MURDER IS LIBERTY."

And due process of law has compelled the U.S. Supreme Court to admit in court that Roe v. Wade is void. This is the legal equivalent of the express overruling of Roe v. Wade by the Supreme Court.

Moreover, the universal words "any person," as used in the Fifth and Fourteenth Amendments to the U.S. Constitution, do include the unborn.

Roe v. Wade must be expressly overruled, so this national scheme of criminal extermination in violation of the U.S. Constitution can be stopped. This disposes of all the issues raised by the parties.

ARGUMENT

I.

ROE v. WADE IS VOID, BECAUSE THE SUPREME COURT HITLER-LIKE DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER." THE DECREE THAT "MASS MURDER IS LIBERTY" IS THE ULTIMATE LAWLESS JUDICIAL ACT.

In Roe v. Wade, the Supreme Court decreed killings to be "liberty" which had been democratically defined to be "murder" since long before adoption of the Fourteenth Amendment.[1]

1./ When the Fourteenth Amendment was adopted, an abortion was murder if the child was "born alive." And a child could be "born alive" long before viability.

A. The English Common Law

The English common law, as stated in the works of Coke, (3 Inst. 50), Hawkins, (1 Hawkins Ch. 13, s. 16) and Blackstone, (4 Bl. Com. 198) defined an abortion, in which a "quick" child died after being "born alive," to be "murder."

Thus, under the common law, an abortion of an unviable child, a child too immature to survive outside the womb, who died after being born alive, was "so horrible an offense" and "this is murder." 3 Inst. 50.

Regina v. West, 2 C & K 784 (1848) followed Coke, Hawkins, and Blackstone, and ruled that an abortion was murder if the child

In 1857, the American Medical Association began a two year study of all the abortion laws in the United States. The 1859 report stated the law of murder throughout the United States, as follows:

> "If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder." Reported in A.S. Taylor, infra page 7, at 462. (emphasis added)

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was born alive, even though the child died because it was too immature to survive outside the womb.

The indictment for murder alleged that the defendant had inserted a "certain pin ... upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Regina v. West, 2 C & K at 784-85. The child died shortly afterward. A "medical witness" had testified:

"[I]t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any

Yet, in 1973, this is the very killing which the U.S. Supreme Court decreed to be "liberty." See photo, infra A-1.

In the plainest terms, the U.S. Supreme Court decreed: "MASS MURDER IS LIBERTY."

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considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K at 786.

The judge, relying on Coke and Blackstone, instructed the jury that if the child were "born alive," the abortion was murder, even though the child were not viable:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes the child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Regina v. West, 2 C & K at 788.

The case of Regina v. West, supra, was

Many people would be astonished to learn that this case for the unborn is the very case they would have to present for themselves if their own right to life were challenged in a federal court.

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cited by the leading English writers as the correct statement of the law of murder. See, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). An abortion which resulted in an unviable child being born alive was murder.

B. THE AMERICAN LAW OF MURDER IN 1868

The common law is the dictionary for the state and federal homicide statutes; American courts used it to construe the meaning of their murder statutes. Hamilton v. United States, 26 App. D.C. 382 (1905); Clarke v. State, 117 Ala. 1 (1898).

By the time the Fourteenth Amendment was adopted in 1868, the leading American legal authorities had specifically cited Regina v. West, supra, as the correct statement of the law of murder.

As Wharton explained the law, A Treatise on

For example, take almost any group of persons, such as the insane, or invalids, or Jews. Suppose it were claimed in federal court that it is "liberty" to deliberately kill members of these groups, as well as the unborn.

What factual, non-argumentative evidence

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the Law of Homicide in the United States 93 (1855):

"If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

American authorities agreed that this was the correct statement of the law of murder. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, Manual of Medical Jurisprudence 462, 517 (Penrose Am. ed. 6th ed. 1866). This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.

C. THE LAW OF MURDER AND THE MEANING OF THE FOURTEENTH AMENDMENT

If the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant from its mother's

could be found to establish their right to life under the U.S. Constitution?

As the case for the unborn shows, it would do no good to object that no one ever heard of a "liberty" to deliberately kill the insane, or invalids, or Jews - or to object that such killings had thereto been defined as criminal.

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womb and leaving it to die, as murder, then it is certain that they did not intend to exclude the lives of these children from the protection of the Fourteenth Amendment so they could be deliberately killed with impunity from criminal statutes.

If the people who framed and adopted the Amendment had condemned the deliberate killing of Jews to be murder, it is certain that they did not intend to exclude Jews from the protection of the Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes. Changing the names of the victims does not change the legal result.

But by seizing upon viability, the Supreme Court decreed the same killing to be "liberty" which the American people had universally defined to be "murder." It is a naked decree without any investigation whatever into the law of murder. In its ignorance, the Court decreed: "Mass Murder is Liberty."

Since the universal words "any person" in

And the Fifth and Fourteenth Amendments merely state that they protect the life of "any person." So, as with the unborn, the Amendments do not expressly refer to the insane, or invalids, or Jews; and their legislative histories do not appear to specifically refer to the insane, or invalids, or Jews.

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the Fourteenth Amendment must include all persons whose lives were protected by the law of murder when the Amendment was adopted, the lives of these children were specifically guaranteed by the Amendment. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, then the lives of these children are still protected by the Fourteenth Amendment. Roe v. Wade is void.

D. THE HYSTEROTOMY ABORTION UNDER ROE v. WADE

A common way to perform abortions under Roe v. Wade is by hysterotomy. Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass. 1976). A hysterotomy is essentially a caesarean, in which a live but unviable child is taken from the womb and left to die. HEARINGS ON THE PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; and their legislative histories, to the extent they have any, do not appear to specifically refer to these groups.

The principle in the Declaration of

94th Cong., 2d Sess., Ser. 46, Part 1, at 391 (1976).

As established by medical testimony at these 1976 House abortion hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive." Id., at 397.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder.

E. ROE v. WADE AND MISTAKE OF LAW

The constitutional provisions against ex post facto laws do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). And mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft #4, Comments Sec. 2.04, at 138.

Since Roe v. Wade is a mistake of law, mass murder is being perpetrated in the United

Independence, that all people are "created" equal, and endowed with an unalienable right to life, having been sneered out of court in Roe v. Wade, now provides no assurance for anyone. The Court so perverted the Declaration of Independence as to amount to just this: "All men are created equal, except those created to be murdered for the convenience of others."

States under guise of law. The Roe v. Wade hysterotomy killings, by definition under the law of murder when the Fourteenth Amendment was adopted, and thus also constitutional law, violate the murder statutes throughout the United States.

The Supreme Court decreed mass murder to be liberty without any examination of the law of murder; it was a naked decree. And as Abraham Lincoln warned, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him. 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. 3 Wharton's Criminal Law and Procedure 673 (12th ed. 1957).

And year after year the U.S. Supreme Court has deliberately adhered to its decree that

So, what factual, non-argumentative evidence is there for the insane, or invalids, or Jews to protect themselves from a judicial decree that it is "liberty" to deliberately kill them with impunity from criminal statutes?

"Mass Murder is Liberty" in the very teeth of challenges that these children were being murdered in violation of the Constitution and laws of the United States, and of the States. See amicus curiae brief of The Legal Defense Fund for Unborn Children, filed in Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1983).

This is deliberation and premeditation unparalleled in the legal history of the world. The Justices responsible for these killing may be facing the death penalty in very many states.

It may be that the judges responsible for these murders did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote: "Ignorance of the law is no excuse for breaking it....It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (Little Brown paperback 1963).

Roe v. Wade is not going to protect one

The case for the unborn is the case for many others; it is this same body of factual evidence which many people must ultimately rely upon to establish that their right to life is protected by the U.S. Constitution.

If the people who framed and adopted the Fourteenth Amendment had condemned the deliberate killing of Jews to be "murder," then it is certain that they did not intend to exclude the lives of Jews from the

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single judge from the law of murder, because it is a mistake of law. Mass murder is not liberty. These children were murdered in violation of the Constitution and positive criminal statutes.

F. CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

Since the U.S. Constitution is "the supreme law of the land," and the evidence proves that the lives of these children are protected by the U.S. Constitution, Roe v. Wade is void.

protection of the U.S. Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes.

And merely changing the names of the victims would not change this conclusion.

Since the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant, whether viable or not, from its mother's womb and leaving it to die to be "murder," it is certain that the framers did not intend the Amendment to create a "liberty" to deliberately kill these children with impunity from criminal statutes. It is certain that the lives of these children are protected by the U.S. Constitution.

Since the right to life protected by the Constitution does not just disappear with time, as whitewash weathers off an aging fence, it is certain that the lives of these children are still protected by

the U.S. Constitution. And since the Constitution is the "supreme law of the land," it is certain that Roe v. Wade is void; it is not law.

The thousands of "born alive" abortions since 1973 can be prosecuted as murder.

If the Court had decreed it "liberty" to deliberately kill Jews, it would rightly be denounced as murder. Judges may have more sympathy for other victims, but changing the names of the victims from "Jew" to "unborn" will not change the legal result.

In his novel "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, yet, the U.S. Supreme Court has defrauded the American people into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

When judges decree that "MASS MURDER IS LIBERTY," then it can not be pretended that

it is any longer the government of the United States - or any government of constitution and laws.

Abraham Lincoln ridiculed the Dred Scott decision by reducing it to its plainest terms: "That if any one man, choose to enslave another, no third man shall be allowed to object."2 In Roe v. Wade, the Court invented an even more astonishing falsehood, "That If any one man, choose to murder another, no third man shall be allowed to object."

The U.S. Supreme Court has Hitler-like asserted to legalize mass murder. By

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2./ 2 Collected Works of Abraham Lincoln 462 (Basler ed. 1953). In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 451 (1857), the U.S. Supreme Court held that the word "person," as used in the Constitution, did not include Negroes. While the Court did not assert a "liberty" to deliberately kill Negroes, the Court did rule that "the right to property in a slave is distinctly and expressly affirmed in the Constitution," and Congress could not prohibit slavery in the federal territories.

changing the names of the victims, the Court has duplicated the conduct of "the supreme judge" of Nazi Germany.[3]

The evidence shows that the U.S. Supreme Court is committing mass murder under the guise of law; the dagger of the assassin has been concealed beneath the robe of the jurist. Roe v. Wade is void.

3./ The Nuremberg court described how Hitler was "the supreme judge" of Nazi Germany. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011 (1951). This "supreme judge" decreed deliberate killings to be legal which had been defined as criminal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted within the authority of the decrees of "the supreme judge." United States v. Altstoetter, supra, 983-85. But the Nuremberg Court held, "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, 985.

By changing the name of the victims from "Jew" to "unborn," the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. But changing the name of the victims will not change the legal result. Roe v. Wade is murder.

II.

ROE v. WADE IS VOID BECAUSE THE COURT USED F.\LSE EVIDENCE, AND UNCONSTITUTIONAL BURDENS OF PROOF, TO INFER THAT "THE WORD 'PERSON,' AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN." THE UNIVERSAL WORDS "ANY PERSON," AS USED IN THE CONSTITUTION, DO INCLUDE THE UNBORN.

The Court used fabricated evidence in Roe v. Wade, and unconstitutional burdens of proof and persuasion, to infer "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."

The evidence proves that the universal words "any person," as used in the Amendment, do include the unborn.

A.

The Court admitted that if the unborn were "a 'person,' within the language and meaning of the Fourteenth Amendment," then the case for a "liberty" to kill the unborn, as claimed in Roe v. Wade, "of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." Roe v.Wade, 410 U.S. at 156-157.

B.

The terms of the Fourteenth Amendment ("nor shall any state deprive any person of life ... without due process of law") (emphasis added) are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The universal words "any person" make no distinction between born and unborn persons, and on their face admit of no exceptions whatever. Thus, on their face, the universal words "any person" include the unborn, as everyone else.

C.

The holdings of Chief Justice John Marshall prove that the Supreme Court has no lawful power to construe an exception to universal terms, such as "any person," unless:

1. the Court can show that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all

mankind would, without hesitation, unite in rejecting the application";1 and

2. the Court can prove that "had this particular case been suggested [to the framers], the language would have been so varied, as to exclude it, or it would have been made a special exception."2

Chief Justice Marshall founded the universality of the Supreme Court's jurisdiction on these very rules.3

1./ Sturges v. Crowninshield, 4 Wheat. 122, 203 (1819). Before the Court can exclude the unborn from the universal words "any person," so they can be deliberately killed with impunity from criminal statutes, the Court must prove that including the unborn, within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

2./ Dartmouth College v. Woodward, 4 Wheat. 518, 644 (1819). The Court had to prove that if the case of the unborn had been suggested to the Framers, they would have changed the Amendment to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

3./ Cohen v. Virginia, 6 Wheat. 264, 378-380, 422-423 (1821).

The Court bore an extraordinary burden before it could imply an exception to the universal terms "any person" so millions of persons could be deliberately killed with impunity from criminal statutes.[4]

4./ The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court can imply an exception to the universal terms "any person," so that Jews could be deliberately killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the Court must prove that if the case of the Jews had been suggested to the framers of the Fourteenth Amendment, "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra. The framers would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law."

These same burdens must apply to anyone whose personhood may be challenged, including the unborn. Thus, the Court bore the heaviest burden in constitutional interpretation in order to imply an exception to the universal terms "any person" so that millions of unborn children could be deliberately killed with impunity from positive criminal statutes.

The Supreme Court fabricated false evidence in Roe v. Wade to imply that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."5

5./ SUMMARY OF FALSE EVIDENCE

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already enacted criminal statutes which made abortion at any stage of gestation a crime unless it were necessary to save the life of the mother or child. Within a few years, these statutes were universal.

In those few states still controlled by the common law on abortion, it is not possible to state with any assurance that the law was any different than in those states with abortion statutes. Some state supreme courts had ruled that the common law made abortion a crime throughout gestation. Mills v. Comm. 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885). And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

[continued on next page]

The people who framed and adopted the Fourteenth Amendment had already democratically defined the deliberate killing of the unborn to be a crime. The Supreme Court knew it could not imply an exception to the universal terms "any person" to decree "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY." So the Supreme Court fabricated evidence to make it appear that those 19th century abortion statutes were not intended

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Any theory of a "liberty" to deliberately kill the unborn faced an impossible contradiction: How was it possible that the people who adopted the Fourteenth Amendment had enacted criminal statutes to protect the lives of the unborn, but at the same time, without a single word of explanation, intended to imply an exception to the universal terms "any person" so there would be a "liberty" to deliberately kill the unborn with impunity from their criminal statutes? This absurd contradiction wrecks Roe v. Wade.

To resolve this fatal contradiction, the Court fabricated the hypothesis that when the criminal abortion statutes were first enacted, the laws were not intended to protect the unborn life, but were only

to protect the lives of the unborn. The purpose of the falsification was to make it appear that this nation had always deemed abortion to be "liberty," and not crime. The Supreme Court perpetrated the Orwellian crime of falsifying the legal history of the United States to make criminal extermination appear to be "liberty."

If the Court had decreed it "liberty" to deliberately kill Jews, and fabricated evidence to make it appear that the

American people had always deemed it

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intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

A.

The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148. This is asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n. 43. But, this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The book did not even mention

liberty, and not crime, to kill Jews, then it would rightly be condemned as murder. Judges might have greater sympathy for other victims, but changing the name of the victims from "Jew" to "unborn" will not change the legal result.

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the abortion operation.

The 19th Century obstetric authorities throughout the Western world prove the Court's assertion of fact to be false.

These 19th century obstetric authorities, based on their own experience in performing abortion, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802) (English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th American ed. 1852); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864)(American physician). The 19th century obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th

The lives of the unborn must be protected by the Fourteenth Amendment. The framers used the universal terms "any person," without any exceptions. And no exception may be implied. The people had already enacted criminal statutes to protect the

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century physicians generally used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, at 99. One 19th century physician traced this operation back almost 2000 years. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

Consequently, the 19th century physicians were generally using an ancient abortion procedure which they described as not hazardous to the life of the woman.

The Supreme Court did not examine even one single 19th century obstetric textbook. And the medical textbooks prove its assertion of fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortion, even safe abortions by physicians. Had it been the purpose of the legislators to only protect

lives of the unborn. No court can imply an exception to the universal terms "any person" to decree: "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY." So the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

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the mother, they would have only required abortions to be performed by physicians, which were known all over the western world to be safe to the mother.

B.

The Supreme Court next asserted: "Abortion mortality was high." Roe v. Wade, 410 U.S. at 149. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities prove this assertion of fact to be false. The medical authorities expressly asserted that the abortion operation was not hazardous to the life of the mother.

The purpose of this assertion is to go beyond the mere theory that abortion was hazardous to the mother, and imply that the carnage was so great as to call for legislation to protect mothers from the medical profession.

But the obstetric texts prove the Court's assertion, "Abortion mortality was high,"

E.

Not only are indispensable parts of the Supreme Court's evidence fabricated and false, but the Court also unconstitutionally reversed the burdens of proof and persuasion, as set out in the rulings of Chief Justice John Marshall.

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to be a false statement of fact.

C.

Upon these two false assertion of fact, the Court falsely infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149. This is a false inference, drawn from false assertions of fact.

Moreover, the 19th century treatises on criminal law state that these criminal abortion laws were intended to protect the lives of the unborn. 2 F. Wharton, A Treatise on the Criminal Law of the United States 200-203 (7th ed. 1874). There is none to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these writers would certainly have noted it.

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the universal terms "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court unconstitutionally reversed the burdens of proof and persuasion. The Court

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destruction from abortions. That legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals, shows their great respect for unborn life.

D.

From the false inference that the criminal abortion laws were not intended to protect the lives of the unborn, the Court falsely inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158. This false conclusion is drawn from a false inference which is drawn from false facts.

Conclusion

The Supreme Court bore the burden of proving that the absurdity and injustice of including the unborn within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the

placed the burden on the unborn to prove with "assurance" (which means to make certain and put beyond doubt) that they were persons within the universal words terms "any person," or the unborn would be excluded from the terms "any person" so they could be deliberately killed with impunity from criminal statutes.

The Court reversed the burdens of proof

Court had to prove that if the case of the unborn had been presented to the framers and adopters of the Fourteenth Amendment, "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra.

But, the Court could not cite even one 19th authority that expressly agreed with its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," much less one who asserted that there was a "liberty" to deliberately kill the unborn with impunity from criminal statutes.

The legal history demonstrates that the people did intend the Amendment to protect the unborn: they used universal language most appropriate for the purpose; and, the people had already enacted criminal abortion laws to protect the unborn in fact. The universal words "any person," as used in the Fourteenth Amendment, must include the unborn.

in the following manner:

First, the Court declared a "liberty" to deliberately kill the unborn with impunity from criminal statutes.[6]

Second, subsequently, the Court looked to see if the lives of the unborn were protected by the Fourteenth Amendment.[7]

Third, the purpose of first decreeing a "liberty" to deliberately kill the unborn, before the Court even looked to see if the lives of the unborn were protected by the Constitution, was to impose the "compelling state interest" test on the unborn. This placed a very heavy burden on the unborn

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6./ Roe v. Wade, 410 U.S. at 153.

7./ Roe v. Wade, 410 U.S. at 156-157. The Court assumed the very thing which was to be proved by evidence. By the Court's own admission, if the lives of the unborn were protected by the Fourteenth Amendment, then the alleged "liberty" to kill the unborn "of course, collapses." But, the Court decreed a "liberty" to kill the unborn, before it even looked to see if their lives were protected by the Constitution. It is analogous to a court finding an accused to be guilty before it heard the evidence.

to prove that their right to life was protected by the Constitution.[8]

Fourth, the Court stated that the evidence did not prove "with any assurance" that the lives of the unborn were protected by the U.S. Constitution.[9] This confirms that the Court placed the burden on the unborn to prove with "assurance" that their lives are protected by the Constitution.

Finally, the Court ruled that the unborn had not met their burden of proof and the unborn could be deliberately killed with impunity from criminal statutes.

This process is analogous to a court first adjudging the accused in a criminal

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8./ Roe v. Wade, 410 U.S. at 156. As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment, and that the purpose of their abortion statute was to protect the lives of the unborn. Thus, a heavy burden of proof was placed on the defenders of the abortion statute to prove that the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

9./ Roe v. Wade, 410 U.S. at 157.

case to be guilty, before it even heard the evidence, then placing the burden on the accused to prove himself innocent beyond a reasonable doubt, or be hanged.

The burdens used in Roe v. Wade are unconstitutional, and savagely criminal.

If the Court first decreed a "liberty" to kill Jews, and then placed the burden on the Jews to prove with "assurance" that their lives were protected by the U.S. Constitution, it would rightly be condemned as murder. Judges may have more sympathy for other victims, but changing the name of the victims being killed from "Jew" to "unborn" will not change the legal result.

Rather, under the rulings of Chief Justice Marshall, the burden was on the Court to prove with "assurance" that the unborn were not included within the universal terms "any person," or they would be included.

The evidence for the unborn is far

stronger than for other groups which the Court has judicially recognized to be included within the terms "any person."[11]

The U.S. Supreme Court has defied the express words "any person" in the Fourteenth Amendment, and their spirit,[12]

11./ The Court was so sure that "corporations" were included within the universal terms "any person" that it forbade any oral argument to the contrary. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886). And the Court held that "strangers and aliens" were included within the terms "any person" by merely observing: "These provisions are universal in their application." Yick Wo v. Hopkins, supra, at 369. No evidence whatever was required.

12./ The uncontradicted scientific medical evidence in Roe v. Wade showed that the unborn child is "alive." The heart begins "pulsations at 24 days." And "brain waves have been noted at 43 days."

The Court has recognized that, while the Declaration of Independence is not law in itself, yet it is "the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. 150, 159-160 (1896).

The undisputed scientific evidence proved that the unborn child has been "created" and thus endowed with an "unalienable" right to "life." Thus, the universal terms

and the plain intention of its framers and adopters,[13] and condemned to death millions of victims whom the Constitution of the United States endeavors to preserve.

The evidence proves that the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

And the universal words "any person," as used in the Fifth Amendment, must also

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"any person," as used in the Amendment, must also include the unborn. The right to life of the unborn is guaranteed, not just by the spirit of the Declaration of Independence, but by the express words of the U.S. Constitution.

Roe v. Wade corrupted the Declaration of Independence to read: "All men are created equal,- except those created to be killed for the convenience of others."

13./ The people who adopted the Fourteenth Amendment not only used the express and universal terms (not "any person" could be deprived of life without due process of law) without any distinction between born or unborn life, but those people had already enacted criminal abortion statutes to protect the lives of the unborn in fact.

include the unborn.[14]

And the unborn are also protected from judicial extermination by 18 U.S.C. § 242.[15]

Since the U.S. Constitution is "the supreme law of the land," and its universal terms "any person," as used in the Fifth

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14./ As the Court reasoned in Bolling v. Sharpe, 347 U.S. 497 (1954), if the Fourteenth Amendment prohibits racially segregated schools in the States, then it would be "unthinkable" that the Fifth Amendment permitted them in the District of Columbia. By the same reasoning, since the killings are prohibited in the states by the Fourteenth Amendment, it is "unthinkable" that the Fifth Amendment could permit them in the District of Columbia. Regardless of the evidence relevant to the Fifth Amendment, the purpose of a subsequent amendment is to amend. Hunter v. Underwood, __ U.S. __, 85 L Ed 2d 222, 231 (1985).

15./ The history of 18 U.S.C. § 242 shows that it was intended to protect all persons whose lives were guarded by the Fourteenth Amendment. Screws v. United States, 325 U.S. 91, 98 (1944). Since the universal words "any person," as used in the Fourteenth Amendment, do include the unborn, their lives are also protected by 18 U.S.C. § 242. "Even judges ... could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242." Imbler v. Pachtman, 424 U.S. 409 (1976), 47 L Ed 2d 128, 142 (1976).

and Fourteenth Amendments, do indisputably include the unborn, it is also indisputable that Roe v. Wade is unconstitutional and void. Roe v. Wade is no law at all.

And any judge who follows Roe v. Wade, and permits the killings to continue, will be guilty of complicity in a national scheme of criminal extermination in violation of the Constitution and laws of the United States.[16]

16./ Since 18 U.S.C. § 242 protects the lives of the unborn from extermination by federal judges, any judge who willfully permits these Roe v. Wade killings to continue can be prosecuted for complicity in a national scheme of extermination, in violation of the Constitution and laws of the United States. And the death of each unborn child can be punished with life imprisonment. Since judges have willfully exterminated millions of victims by Roe v. Wade, judicial liability under this one statute is unparalleled in the legal history of the world.

III.

ROE v. WADE IS VOID BECAUSE THE SUPREME COURT USED UNCONSTITUTIONAL AND CRIMINAL PROCEDURES TO EFFECT AND MAINTAIN THE ROE v. WADE KILLINGS.

The Supreme Court willfully used unconstitutional procedures to effect the Roe v. Wade killings.[1]

1./ The Court willfully used the following unconstitutional procedures, despite objection, to effect Roe v. Wade:

A. Denial of Assistance of Counsel

Counsel did not especially represent the unborn in the District Court in Roe v. Wade. And the Supreme Court denied a request by an original party to allow counsel to especially represent the unborn in the Supreme Court. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice

The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after the case reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

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And the Supreme Court subsequently decided many abortion cases on the merits, but, despite objection that the process was unconstitutional and criminal, willfully used unconstitutional procedures to maintain the Roe v. Wade killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers)

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that it had not had opportunity to cross-examine the Court's evidence in a judicial proceeding.

D. Denial of Right to Cross-Examine
An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence
An original party asked permission to present evidence under the new constitutional standards which it had not seen before to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And the killings commenced.

counsel to represent the victims being killed;[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that the lives of the unborn are not protected by the U.S. Constitution,

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2./ Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel to represent the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel to represent the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel to represent the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel to represent the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel to represent the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel to represent the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel to represent the unborn denied 445 U.S. 959; Simopoulos v. Virginia, __ U.S. __, 76 L Ed 2d 755, motion to allow counsel to represent the unborn denied 73 L Ed 2d 1364; Planned Parenthood of Kansas City v. Ashcroft, __ U.S.__, 76 L Ed 2d 733, motion to allow counsel represent the unborn denied 73 L Ed 2d 1364; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to represent the unborn denied 73 L Ed 2d 1364.

to be confronted and cross-examined;[3]

3. The Supreme Court willfully refuses to allow evidence to be presented on behalf of the victims being killed to establish their right to life under the U.S. Constitution.[4]

The Supreme Court's own rulings on due process of law show these procedures to be unconstitutional.[5]

3./ See cases, supra note 2. The evidence in Roe v. Wade, used to infer that the lives of the unborn are not protected by the Constitution, has never been cross-examined, despite the charge that the Court fabricated its evidence.

4./ See cases, supra note 2.

5./ Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970); In Re Gault, 387 U.S. 1 (1967).

If the Constitution would not permit a court to condemn even one single Jew to death in a criminal case, but deny all these procedural rights, then neither can any court condemn any or all Jews in the United States to death, but deny all these procedural rights, by calling it a

Since the deprivation was willful, these procedures are also criminal.[6]

These are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of

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civil proceeding, and decreeing that the lives of Jews are not protected by the U.S. Constitution, and it is "liberty" to deliberately kill Jews with impunity from criminal statutes.

If the process used to effect and maintain the Roe v. Wade killings, were used to decree it "liberty" to kill Jews, it would rightly be denounced as murder. But changing the names of the victims being killed, does not change the legal result.

Any victim is entitled to all the procedural protections described in Goldberg v. Kelly, supra, before any court can decree that the victim's life is not protected by the U.S. Constitution, and the victim can be deliberately killed with impunity from criminal statutes.

6./ "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976). The deprivation was willful because the Court repeatedly denied all these procedural rights in the teeth of the objection that the denial was unconstitutional and criminal. Thus the deprivation of these procedural rights was criminal.

complicity in extermination and murder.[7]

If the Supreme Court had used these procedures to decree it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. While judges may have more sympathy for another category of victims, changing the names of the victims from "Jew" to "Unborn" will not change the legal result.

Having decreed that "MASS MURDER IS LIBERTY," the Court now maintains the killings by criminally refusing to allow truth to work in its Court.

It is notorious that truth is not permitted to work in the proceedings in the U.S. Supreme Court, and that the Court

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7./ "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel... (T)he accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried." United States v. Altstoetter, supra, at 1046-47 (1951).

falsifies history to achieve its ends.[8]

The Supreme Court has made a murderous mockery of due process of law.

The use of these procedures, to exclude millions of victims from the protection of the U.S. Constitution, so they can be deliberately killed with impunity from criminal statutes, is unconstitutional, and makes Roe v. Wade void.

8./ "The Court... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design .... Such conduct impels one to conclude that the Justices are become a law unto themselves. ... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408, 412 (Harvard Univ. Press 1977).

"Court had adjourned in the real world.... (T)hey [the Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, The Wall Street Journal, editorial page, December 27, 1984.

IV.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND TO ADMIT THAT ROE v. WADE, 410 U.S. 113 (1973), IS VOID.

For the 85th time, the U.S. Supreme Court is accused in its own court with criminally exterminating millions of victims in violation of the U.S. Constitution, and 18 U.S.C. § 242.[1]

For the 61th time, the U.S. Supreme Court is accused in its own court with mass murder in violation of state and federal statutes;[2]

For the 65th time, the U.S. Supreme Court is accused in it own Court of using unconstitutional and criminal procedures to effect and maintain the Roe v. Wade killings.[3]

But, the U.S. Supreme Court has never denied the charges, much less attempted to

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1./ Charges based on evidence, supra p. 3.

2./ Charges based on evidence, supra p. 18.

3./ Charges based on evidence, supra p. 38.

prove the charges to be false.

These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims are being killed, is an admission that the charges are true.[4]

> "Failure to contest an assertion, however, is considered evidence of

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4./ Under "the tacit confession rule," McCormick on Evidence, § 161, 270, failure to deny a charge is tantamount to a confession that the charge is true. Also 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick, supra, § 161. The Supreme Court has consistently affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago: "you are silent and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Apology in Plato 41, 45 (Jowett transl. 1942).

> acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process of law has compelled the U.S. Supreme Court to confess that the charges are true, and that Roe v. Wade is void.

First, the evidence makes it clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[5] No denial is possible.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. The judges had a legal duty to attend to allegations that Roe v. Wade was wrongly decided:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its

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5./ The Supreme Court decreed killings to be "liberty" which the people had democratically defined to be "murder." This is mere historical fact; no denial is possible. The decree that "Mass Murder is Liberty" is the ultimate lawless act.

judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

In view of their oath, when judges "close their eyes on the Constitution", and "condemn to death those victims whom the Constitution endeavors to preserve," it is worse than solemn mockery, it is "crime."[6]

6./ Marbury v. Madison, 1 Cranch 137, 179-180 (1803). Chief Justice John Marshall wrote that for judges to swear to support the Constitution as the supreme law of the land, but then "close their eyes on the constitution," and "condemn to death those victims whom the Constitution endeavored to preserve" was worse than "solemn mockery," it is a "crime."

Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When he was warned of Auschwitz, Speer wrote that "I did not investigate - for I did not want to know what was happening there.... [F]rom fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76 (1970). This "deliberate blindness" was complicity in criminal extermination.

Federal judges are guilty of crime when

Third, the Court's steadfast silence, year after year, in the face of the scores of accusations that it is guilty of mass murder, is unparalleled in the legal history of the world, and it is the very circumstance which the Court itself has cited as making confession by silence more trustworthy.[7]

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but the Court's silence has persisted even in the teeth of warnings that under its own rulings, its silence in the face of the charges was being taken as an admission that the charges are true, and

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they close their eyes on the evidence, and permit victims to be executed, whom the Constitution endeavors to preserve.

7/ Concerning the Court's continuing silence year after year: "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Roe v. Wade is a mistake of law.[8]

Fifth, the charges described the most corrupt judicial system which the human mind can imagine, that:

(1) judges had criminally exterminated millions of children in violation of the Constitution and laws of the United States, and of the States;

(2) the United States was being ruled over by a tribunal of murderers;

(3) due process had compelled the tribunal of murderers to confess in its own court to guilt of mass murder; and

(4) the tribunal of murderers was maintaining its murders by keeping truth from working in the courts of the United States.

8./ "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." Amicus curiae brief by the Legal Defense Fund For Unborn Children, filed in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Never in the legal history of the world was it more imperative to deny charges if they were untrue.

Thus, when judges, under solemn legal duty to uphold the law, are accused of mass murder in their own court year after year, and the evidence is laid out in court, and pictures of the dead are shown to the judges, but year after year, while the victims are being killed, the judges do not deny the charge, much less attempt to prove it false, then not only a 2000 year old law of evidence, but the solemn legal duty imposed by a government of laws, condemns this silence as a confession that the charge is true; and their decree is void.

The immediate practical result is that due process has compelled the U.S. Supreme Court to admit that Roe v. Wade is a mistake of law. Truth has worked in the U.S. Supreme Court in the only manner in which it was permitted to work. Under our

government of laws, the Supreme Court was met in court with the truth, and due process has compelled the Court to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is void.

Any judge of the United States who closes his eyes on these facts, unparalleled in the legal history of the world, and permits the Roe v. Wade killings to continue, knows he is guilty of complicity in criminal extermination, including mass murder, in violation of the Constitution and laws of the United States, and of the States.[9]

9./ The Supreme Court asserted to legalize killings which had been defined as criminal by positive statutes. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be criminally prosecuted. The ex post facto provisions of the Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not

In the face of facts unparalleled in the legal history of the world, our government of laws will permit only one conclusion: the U.S. Supreme Court was met in court with the truth, and due process

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apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138. Perkins, supra, at 928.

Thus, the law applied at Nuremberg applies to this case. Obedience to the unlawful orders of judicial superiors is no excuse for complicity in criminal extermination. United States v. Altstoetter, supra, at 983-985 (1951).

The Nuremberg court described how "the supreme judge" of Nazi Germany had decreed criminal killings to be legal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, because they were bound to obey the decrees of "the supreme judge." But the Nuremberg court rejected that defense since obedience to the orders of superior judges is no defense in homicide cases: "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, at 985.

To illustrate the true status of Roe v. Wade, suppose a lawyer had accused "the supreme judge" of Nazi Germany of mass murder 50 times in court, but the "supreme judge" never denied the charge, much less attempted to prove it false, and permitted the killings to continue. Could any court,

of law compelled the Supreme Court to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is unconstitutional and void.

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called upon to try the Nazi judges for complicity in murder, have permitted those judges the defense that the silence of "the supreme judge" proved that the killings were lawful? That such silence proved the Nazi judges could permit the killings to continue without question? This is too criminally monstrous for any sane person to dare to insist upon.

The law makes a mortal distinction between killing and not killing which no judge can safely ignore:

1. Any judge who stops the Roe v. Wade killings, and makes a mistake of law, can only be overruled on appeal;
2. But any judge who allows the killings to continue, despite the objection that the Supreme Court decreed "Mass Murder Is Liberty," and makes a mistake of law, can be prosecuted for complicity in mass murder, and be sentenced to death.

The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

Due process has compelled the Supreme Court to overrule Roe v. Wade. Any judge who elects to ignore the facts and take part in a national scheme to mass murder little children, rather than to allow truth to work in court, must deliberately hazard the death penalty. Many states still punish mass murder with the death penalty.

CONCLUSION

The amicus demands that the Court expressly overrule Roe v. Wade, and stop the killings which it perpetrated.

Due process of law has already compelled the U.S. Supreme Court to admit that Roe v. Wade, 410 U.S. 113 (1973), is void.

The U.S. Supreme Court has perpetrated one of the giant criminal exterminations in the peacetime history of the world.

Since the limited affirmative defense of reasonable reliance on an official judicial decision, thereafter determined to be a mistake of law, does not apply to homicide cases, the court should expressly overrule Roe v. Wade, not only to stop the killings, but also to protect unsuspecting persons from taking part in murder and criminal extermination, and sharing the Court's awesome criminal liability.

_____

Alan Ernest, Counsel



A 1

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The photograph, supra A-1, shows a second stage abortion by prostaglandin. Such abortions not uncommonly result in the child being born alive.[1] This Court would be guilty of murder for such killing. There have been thousands of such killings under Roe v. Wade; and witnesses live to tell.

If the child were born dead, the Court would be guilty of criminal extermination.[2]

As the Court studies the face of this victim of Roe v. Wade, let it contemplate that a government of laws shall be restored, and call the killers to account.

1./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977). There are about 140,000 second stage abortions each year. All the common second stage abortion techniques - hysterotomy, prostaglandin, and even salt poisoning - can result in the child being born alive. Jefferies and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

2./ Since the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn, their lives are also protected from judicial extermination by 18 U.S.C. (242.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, *et al.*,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF WATSON D. BOWES, JR., M.D. AND RICHARD T. S. SCHMIDT, M.D. IN SUPPORT OF APPELLANTS

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BRIEF AMICI CURIAE OF
WATSON D. BOWES, JR., M.D. AND
RICHARD T. S. SCHMIDT, M.D.,
IN SUPPORT OF APELLANTS

INTEREST OF AMICI CURIAE

Amicus Watson A. Bowes, Jr., M.D., is a professor in the Department of Obstetrics and Gynecology, Division of Maternal and Fetal Medicine, at the University of North Carolina School of Medicine. (*See* Appendix for curriculum vitae.) Amicus Richard T. F. Schmidt, M.D., is Director of the Department of Obstetrics and Gynecology at Good Samaritan Hospital in Cincinnati, Ohio, and is former national president of the American College of Obstetricians and Gynecologists. (*See* Appendix for curriculum vitae.) Amici recognize the importance of recent advancements of modern medicine in the area of fetal viability, and the need for room for further developments in the care of unborn and premature children. Amici also recognize the need for the collection of basic

health data to assist the development of care for pregnant women and their children.

Amici have obtained written consent from the parties for the filing of this brief, and have filed the consent letters with the Clerk of this Court.

SUMMARY OF ARGUMENT

The court of appeals held unconstitutional certain abortion reporting requirements of Pennsylvania law. These provisions allow Pennsylvania to obtain basic information essential to the protection of viable unborn children and women undergoing abortions, and thus represent permissible abortion regulations.

One section (§ 3211(a)) requires the aborting physician to determine, in pregnancies beyond the first trimester, whether the child to be aborted is viable. If the physician concludes that the child is not viable, he must report the basis for that determination. This provision represents a valid expression of the compelling state interest in protecting viable unborn children. *See Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 63-64 (1976).

The state has a compelling interest in the protection of viable unborn children. If this compelling interest is to have any meaning, the state must be able to identify, as a threshold matter, which unborn children are viable. The state may not, however, itself fix an arbitrary point of viability, but must instead rely upon the judgment of the physician. Hence, in order to effectuate its interest in protecting viable unborn children, the state may require the physician to make the determination of viability.

Pennsylvania has limited the requirement of a viability determination to abortions after the first trimester of pregnancy. The exclusion of abortions performed in the first trimester, though not constitutionally necessary (viability determination in the first trimester is, because medically trivial, constitutionally insignificant), exempts the vast majority of abortions of nonviable children, while allowing room for further expansions at the frontier of viability. (Viability

already extends back into the latter part of the second trimester.)

The viability determination and reporting law does not burden the abortion decision, since it merely requires the physician to consider factors (e.g., length of gestation, woman's general health) already relevant to sound abortion practice. Consequently the test of rational scrutiny applies, and this essential informational law easily passes constitutional muster.

The other reporting provision which the court of appeals struck down (§ 3214(a), (b), (e), (h)) requires the reporting of certain basic health data concerning abortions. This section permissibly furthers the important state interest in maternal health. *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft,* 462 U.S. 476, 486-90 (1983) (plurality opinion); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 80-81 (1976).

The state has an important interest in safeguarding maternal health and medical standards in the area of abortion. Recordkeeping and reporting laws further the health concerns which underly the abortion right; consequently such regulation has no legal impact on this right, even when the regulation causes a small increase in the cost of abortion.

The Pennsylvania law allows the state to obtain routine, basic information relevant to the health supervision of abortion. The data categories largely incorporate national standards for health analysis, and thus both represent accepted epidemologic methods and assist the pursuit of national health objectives. Moreover, the information obtained contributes to the formation of the groundwork for judicial and legislative treatment of abortion and abortion regulations.

The Pennsylvania health reporting requirements do not burden the abortion right. These background health regulations have no legal impact on the abortion decision. Furthermore, a responsible aborting physician will already obtain such standard health data as part of sound abortion practice. Thus, the law merely sets forth standard bookkeeping requirements in the area of vital statistics. Consequently, the

test of rationality applies, and this straightforward health regulation survives constitutional review.

The abortion reporting laws before this Court fall well within constitutional limits, and advance threshold concerns crucial to the expression of state interests in abortion regulation. This Court should uphold the challenged provisions.

ARGUMENT

The Court of Appeals for the Third Circuit struck down as unconstitutional numerous sections of the 1982 Abortion Control Act of Pennsylvania, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983). *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh,* 737 F.2d 283 (3rd Cir. 1984). Two of these sections, §§ 3211 and 3214, establish reporting requirements which permit Pennsylvania to obtain information essential to the safeguarding of state interests in the protection of unborn children and their mothers. The court of appeals effectively and improperly stifled these interests when it prohibited Pennsylvania from securing this information. This Court should therefore reverse the judgment of the court of appeals, and uphold §§ 3211 and 3214.

I.

THE REQUIREMENTS OF § 3211 VALIDLY EXPRESS THE COMPELLING INTEREST OF THE STATE IN PROTECTING VIABLE UNBORN CHILDREN.

Section 3211(a) of the Pennsylvania law provides as follows:

> Prior to performing any abortion upon a woman subsequent to her first trimester of pregnancy, the physician shall determine whether, in his good faith judgment, the child is viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

18 Pa. Cons. Stat. Ann. § 3211(a) (Purdon 1983).

This provision validly furthers the compelling state interest in the life of viable children in the womb; hence, this Court should reverse the decision of the court of appeals and uphold § 3211(a).

A. The State Has a Compelling Interest in the Protection of Viable Unborn Children.

A state has an important and legitimate interest in protecting unborn children. *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 428 (1983). This interest exists throughout pregnancy, *id.,* and becomes compelling when the child attains viability, *id.*

B. The Compelling State Interest in the Life of Viable Unborn Children Supports § 3211.

The compelling state interest in the protection of viable children in the womb supports the requirements of § 3211.

The state interest in viable children would be meaningless if the state could not require the physician to determine whether the child intended for abortion was viable. A state may not proclaim some fixed point in gestation or fetal development to be the point of viability. *Colautti v. Franklin,* 439 U.S. 379, 388-89 (1979); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 64-65 (1976). Legal establishment of such an arbitrary point of viability would be neither constitutionally permissible, *Colautti; Danforth,* nor biologically sound, *Colautti,* 439 U.S. at 395-96. Consequently, the state must rely upon the medical judgment of the responsible physician. *Id.* at 388; *Danforth,* 428 U.S. at 64-65.

At a minimum, then, the state may require the physician whose medical judgment the state relies upon to exercise that judgment and determine whether the child slated for abortion is viable. *See Danforth,* 428 U.S. at 89 (concurring

opinion of Stewart, J., joined by Powell, J.) (upholding challenged definition of viability) ("The State has merely required physicians performing abortions to *certify* that the fetus to be aborted is not viable") (emphasis in original). To enforce this requirement, the state may then require the physician to report the basis for his judgment. *See id.*[1]

The question of viability constitutes a threshold inquiry essential to any regulation of post-viable abortions. Consequently, a state may require a determination of viability for all abortions performed. For those pregnancies for which early gestation currently precludes viability, the inquiry is simple. The determination that the pregnancy has not progressed beyond the first trimester, for example—a determination made as a matter of course—would effectively constitute a determination of nonviability. To report the basis for the determination of nonviability, then, the physician would need only to note that the woman was still at an early stage of gestation.

When the pregnancy has progressed to a point at which viability becomes a realistic possibility, the medical determination becomes somewhat more involved. The relevant state interest, however, becomes correspondingly stronger, as the importance of the viability determination grows. In early pregnancies, the physician's task is trivial, and an important state interest justifies the regulation. In later pregnancies, the medical task is greater, but a compelling state interest justifies the regulation.

Pennsylvania, therefore, could constitutionally have required a determination of viability, and a reporting of the

[1] In *Danforth*, this Court considered parts of a statutory scheme which required, in one provision, that the physician certify the nonviability of any child aborted for reasons other than to preserve the life or health of the mother. While that particular provision was not presented for review, the Court noted in upholding a related section that the provision "reflects an attempt . . . to comply with our observations and discussion in *Roe* [*v. Wade*, 410 U.S. 113 (1973)] relating to viability." 428 U.S. at 63-64.

basis for this determination, for all abortions.[2] The state has not gone so far, however. Instead, it has limited the need for a viability determination to those abortions performed after the first trimester, *see* § 3211(a), and has only required the physician to report the basis of the determination when the physician finds the child not to be viable, *see id.* Thus, § 3211(a) is more narrowly tailored than is necessary, and easily satisfies constitutional requirements.

By limiting the viability determination and reporting requirement to abortions performed after the first trimester, Pennsylvania has spared physicians a minor adminstrative task in the vast majority of abortions,[3] while allowing room for scientific advancement in the area of viability. When this Court decided *Roe v. Wade*, 410 U.S. 113 (1973), the Court noted that viability "is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks." 410 U.S. at 160 (footnote omitted). By the time of the Court's decision in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the frontier of viability had already extended to 22 weeks of gestation. *Id.* at 457 n.5 (O'Connor, J., dissenting). *See also* Dunn & Stirrat, *Capable of Being Born Alive?*, 1 The Lancet 553, 554 (1984) (World Health Organization (WHO) recommendations urge that perinatal statistics include children of 22 weeks gestation or more). At the time of *Roe*, a fetal weight of 1000g represented the general lower cutoff for viability. 462 U.S. at 457 (O'Connor, J., dissenting). By the time of *Akron*, the general cutoff had dropped to 500g. *Id.* at 457 n.5; Dunn & Stirrat, *supra*, at 554 (WHO guidelines set 500g as lower limit). *See also* Pleasure, Dhand & Kaur, *What Is the Lower Limit of*

[2] No difference of constitutional dimension exists between requiring the physician facing a first trimester pregnancy to report—under an all-inclusive statute—that viability cannot exist, or to note—under the Pennsylvania scheme—that the reporting statute does not apply.

[3] For the last five years for which official national statistics are available, at least 90% of all abortions took place during the first trimester. Centers for Disease Control, *Abortion Surveillance, 1981*, in 33 CDC Surveillance Summaries 1SS, 3SS (No. 3SS, 1984).

Viability?, 138 Am. J. Diseases Children 783 (1984) (describing healthy outcome, after two years, of child weighing 440g at delivery).

This trend of expanding viability has already pushed the lower limits of viability back into the second trimester of pregnancy. As technology advances, the capacity for extrauterine survival will reach children of even earlier gestational stages. The Pennsylvania law, by requiring determinations of viability in the second trimester as well as the third, has recognized recent developments in the care of premature infants, and has allowed proper flexibility "for anticipated advancements in medical skill." *Colautti*, 439 U.S. at 387.[4]

Section 3211 does not burden the abortion decision.[5] It merely requires the physician to do that which sound medical practice already would dictate—primarily, obtain an estimate of gestational age and fetal size.[6] These two factors influence the choice of abortion method, *see* Centers for Dis-

[4] These "anticipated advancements" represent the leading edge of medical science; hence state lawmakers cannot predict with precision the date or the extent of future breakthroughs. The Constitution, however, allows the state the latitude necessary to legislate in this area, and does not force the state to amend its laws with each incremental extension of the viability frontier. *Cf. Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 483 n.7, 485-86 (1983) (plurality opinion) (upholding requirement of second physician for abortion of viable children, despite uncertainty of child's survival).

[5] Since a compelling interest supports the regulation of post-viability abortions, § 3211 would survive constitutional scrutiny even if it burdened the abortion right: the threshold determination of viability obviously constitutes an essential prerequisite to any expression of this state interest, and thus is both reasonably related to and narrowly drawn to further this compelling interest.

[6] Other factors possibly relevant to the viability question, *see Colautti*, 439 U.S. at 395-96 (woman's general health and nutrition, quality of available medical facilities), like gestational age and fetal size, represent information essential to the proper performance of abortions; hence the acquisition of such information to determine viability entails no new burden for the physician.

ease Control, *Abortion Surveillance 1979-1980* 6 (1983), and thus inquiry into these factors forms a routine prelude to abortion. Gestation and fetal size, in turn, correspond roughly with fetal weight, Kloosterman, *Birthweight and Maturity*, in 1972 *WHO Public Health Papers* 38 (no. 42); Chervenak, Jeanty & Hobbins, *Current Status of Fetal Age and Growth Assessment*, 10 Clinics Obstet. & Gynecol. 423 (1983), which is the principal indicator of viability, Hutchins, Kessel & Placek, *Trends in Maternal and Infant Health Factors Associated with Low Infant Birth Weight, United States, 1972 and 1980*, 99 Pub. Health Rep. 162, 162 (1984); Sepkowitz, *An Appraisal of Neonatal Intensive Care Unit Weight-Specific Mortality Rates*, 76 J. Okla. St. Med. A. 339, 342 (1983). Requiring the physician to take the extra mental step of formulating a conclusion about viability and—if the conclusion is against viability—reporting the basis for this determination, does not burden the abortion decision, and may even promote maternal health by inducing the physician to scrutinize more closely the state of the pregnancy.

Since § 3211 does not burden the woman's decision to abort, the test of rational scrutiny applies. *Maher v. Roe*, 432 U.S. 464, 478 (1977). As a threshold matter essential to the effectuation of state protection for viable unborn children, the requirements of a viability determination and the reporting of the basis for that determination clearly pass the test of rationality.

Section 3211, then, represents a permissible expression of the compelling state interest in the protection of viable unborn children. The judgment of the court of appeals, which invalidated § 3211(a), should be reversed.

II.

THE REQUIREMENTS OF § 3214 VALIDLY EXPRESS THE IMPORTANT INTEREST OF THE STATE IN PROTECTING MATERNAL HEALTH.

Section 3214 provides, in subsections (a), (b), (e), and (h), for the reporting of certain information relevant to the performance of abortions. The court of appeals invalidated

these subsections. (*See* Appendix for text of subsections.)

These provisions validly implement the interest of Pennsylvania in furthering maternal health.[7] Hence, this Court should reverse the decision of the court of appeals and uphold § 3214.

A. The State Has an Important Interest in the Preservation of Maternal Health.

A state has an important and legitimate interest in safeguarding maternal health and maintaining medical standards in the area of abortion. *Akron,* 462 U.S. at 428-29. This interest exists throughout pregnancy, and becomes compelling at approximately the end of the first trimester. *Id.* at 429. The state may enact regulations that apply to all stages of pregnancy when those regulations "have no significant impact on the woman's exercise of her right" and further "important state health objectives." *Id.* at 430.

B. The Important State Interest in Maternal Health Supports § 3214.

Recordkeeping and reporting laws which promote maternal health constitute permissible expressions of the important state interest in maternal health. *Danforth,* 428 U.S. at 80-81 (general authorization of recordkeeping and reporting); *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft,* 462 U.S. 476, 486-90 (1983) (plurality opinion) (pathology reports). Such recordkeeping furthers

[7] Health concerns support the recordkeeping and reporting provisions of § 3214(a)(1) to (7), (12), (14), and § 3214(b), (e), (h). The provisions of § 3214(a)(8) to (11), (13), merely represent mechanisms for enforcement of other sections of the abortion law. Subsections (8), (10), (11), and (13) expressly refer to other parts of the Pennsylvania law, and enable the state to assure compliance with the law. Subsection (9), requiring a report of the "length and weight of the unborn child when measurable," facilitiates enforcement of the provisions relating to viability, since fetal weight is a main indicator of both gestational age and viability. Sepkowitz, *supra* p. 9, at 342. These subsections therefore constitute permissible corollaries to other valid abortion regulations.

the health concerns which form a predicate for the abortion right, *Connecticut v. Menillo,* 423 U.S. 9, 11 (1975) (per curiam); *see also Harris v. McRae,* 448 U.S. 297, 316 (1980) (woman's health may be core concern supporting abortion liberty). The abortion right presupposes the existence of such regulation, or its equivalent. Consequently, these reporting requirements do not have a "legally significant impact or consequence on the abortion decision," *Danforth,* 428 U.S. at 81; *Menillo,* 423 U.S. at 11. Even when the regulations produce a small increase in the cost of abortions, the resulting burden is "relatively insignificant" and constitutionally permissible. *Ashcroft,* 462 U.S. at 490 (plurality opinion) ($19.40 estimated additional cost per abortion).

Through the provisions of § 3214, Pennsylvania has sought to obtain basic information relevant to the supervision of the health aspects of abortion. The data requested represent standard demographic and medical factors employed in health analyses, form an essential informational basis for medical and legal developments in the area of abortion, and create no serious burdens for the aborting physician.

1. The categories of data incorporate standard demographic and medical factors.

The categories of information sought under § 3214 correspond closely with the type of data which the Centers for Disease Control (CDC), a division of the United States Department of Health and Human Services, uses for its official national supervision of abortion.[8] *Compare* Centers for Dis-

[8] *See* Centers for Disease Control, *Abortion Surveillance 1979-1980* (1983) (preface):

> Recognizing both the importance of abortion as a public health issue and the need for national abortion statistics, the Division of Reproductive Health [a part of CDC] . . . in 1969 began continuous epidemiologic surveillance of abortion in the United States. The objectives of this surveillance are twofold: 1) to document the number and characteristics of women obtaining abortions, and 2) to eliminate preventable mortality and morbidity related to abortion.

ease Control, *Abortion Surveillance 1979-1980* 4-6, 8, 13, 15 (1983) [hereinafter cited as CDC], *with* § 3214(a)(2) (residence status), 3214(a)(3) (age, race, marital status), 3214(a)(4) (prior pregnancies), 3214(a)(5) (gestational age), 3214(a)(6) (type of procedure), 3214(a)(7) (complications), 3214(a)(14) (source of funds for abortion). The Pennsylvania law, in essence, merely adopts the national standards for abortion surveillance. The law therefore facilitates national statistical analysis, by assuring the availability of the data, *see* CDC, *supra,* at 3 (noting varying availability of demographic information from different states), and incorporates accepted means of health review.

2. The information collected forms an essential basis for medical and legal treatment of abortion.

The data provided under § 3214 supplies the basis for informed medical and legal consideration of abortion.

As a medical matter, the collection of health statistics enables the sort of broad perspective necessary for new developments within the field. The CDC, as discussed above, collects abortion information virtually identical to that required under § 3214, to help "eliminate preventable mortality and morbidity related to abortion." CDC, *supra* (preface). *See also Ashcroft,* 462 U.S. at 487-88 (plurality opinion) ("questions remain as to the long-range complications [of abortion] and their effect on subsequent pregnancies") (citations omitted); *Danforth,* 428 U.S. at 81 (recordkeeping "may be a resource that is relevant to decisions involving medical experience and judgment") (footnote omitted).

This Court has repeatedly emphasized the importance of medical judgment to the abortion decision and its effectuation. *Akron,* 462 U.S. at 427, 448, 450; *H.L. v. Matheson,* 450 U.S. 398, 419 (1981); *Colautti v. Franklin,* 439 U.S. 379, 387 (1979); *Doe v. Bolton,* 410 U.S. 179, 192 (1973); *Roe v. Wade,* 410 U.S. 113, 163, 165-66 (1973). The collection and analysis of health statistics relevant to abortion helps facilitate the ideal of the "competent, conscientious, and ethical physician." *Akron,* 462 U.S. at 448 n.39 (citation omitted).

As a legal matter, health statistics form much of the basis for judicial and legislative decisions. This Court has repeatedly relied upon medical statistics in its shaping of abortion jurisprudence. *E.g., Roe v. Wade,* 410 U.S. at 163 (state interest in maternal health becomes compelling at end of first trimester "because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in childbirth"); *Danforth,* 428 U.S. at 77-79 (prohibition on saline amniocentesis unconstitutional because is method which is "most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than . . . normal childbirth"); *Akron,* 462 U.S. at 437-39 (second-trimester hospitalization requirement unconstitutional because "dilation-and-evacuation" method may be used safely on outpatient basis in early weeks of second trimester). In its recent *Akron* decision the Court emphasized the relevance of "accepted medical practice" to the evaluation of abortion regulation. 462 U.S. at 431, 434. The information sought under § 3214 facilitates both the description and the development of accepted medical practice.

Legislative and administrative bodies, furthermore, need information such as that which § 3214 would provide, in order to regulate in the area of abortion. This valuable health data would serve both to aid compliance with the pronouncements of this Court, and to identify problems in need of remedial legislation. Without such information, these governing bodies could only act blindly; the judiciary, meanwhile, would be unable to evaluate the reasonableness of such regulation.

3. The reporting requirements impose no impermissible burdens on the performance of abortions.

The requirements of § 3214 place no impermissible burdens upon the abortion decision or its effectuation. Reporting requirements which further maternal health do not infringe upon the abortion liberty. *Ashcroft,* 462 U.S. at 489-90 (plurality opinion); *Danforth,* 428 U.S. at 81; *Menillo,* 423 U.S. at 11. The Pennsylvania provision requests information

which is readily available from the woman or her physician, and much of which will be necessary in any event as a matter of sound medical practice (e.g., length of gestation, age of woman). Since the data sought in § 3214 largely reflect categories of information already collected in much of the country, *see* CDC, *supra* p.11, § 3214 imposes no more than standard bookkeeping requirements in the area of vital statistics.

The requirements of § 3214 represent valuable implementations of the state interests in protecting maternal health. This Court should therefore reverse the judgment of the court of appeals, which invalidated several provisions of this section.

CONCLUSION

In §§ 3211 and 3214, Pennsylvania has sought to obtain basic information necessary to the implementation of its interests in the protection of viable unborn children and the preservation of maternal health. Since they place no burdens on the abortion right, the test of rationality applies. This standard collection of vital abortion data clearly furthers state health concerns, and thus passes constitutional muster. The judgment of the court of appeals denies the state access to this basic information, and frustrates valid state regulation. This Court should now reverse the judgment of the court of appeals, and uphold the constitutionality of §§ 3211 and 3214.

Respectfully submitted,

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JUNE 29, 1985

APPENDIX

1. Text of Reporting Laws Overturned by Court of Appeals

§ 3211(a) Determination of viability.—Prior to performing any abortion upon a woman subsequent to her first trimester of pregnancy, the physician shall determine whether, in his good faith judgment, the child is viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

§ 3214(a) General rule.—A report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

(1) Identification of the physician who performed the abortion and the facility where the abortion was performed and of the referring physician, agency or service, if any.

(2) The political subdivision and state in which the woman resides.

(3) The woman's age, race and marital status.

(4) The number of prior pregnancies.

(5) The date of the woman's last menstrual period and the probable gestational age of the unborn child.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Complications, if any, including but not limited to, rubella disease, hydatid mole, endocervical polyp and malignancies.

(8) The information required to be reported under section 3211(a) (relating to viability).

(9) The length and weight of the aborted unborn child when measurable.

(10) Basis for any medical judgment that a medical emergency existed as required by any part of this chapter.

(11) The date of the medical consultation required by section 3204(b) (relating to medical consultation and judgment).

(12) The date on which any determination of pregnancy was made.

(13) The information required to be reported under section 3210(b) (relating to abortion after viability).

(14) Whether the abortion was paid for by the patient, by medical assistance, or by medical insurance coverage.

(b) Completion of report.—The reports shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the department within 15 days after each reporting month.

* * *

(e) Statistical reports; public-availability of reports.—

(1) The department shall prepare an annual statistical report for the General Assembly based upon the data gathered under subsection (a). Such report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed, and shall be available for public inspection and copying.

(2) Reports filed pursuant to subsection (a) shall not be deemed public records within the meaning of that term as defined by the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law, but shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report. On those reports available for public inspection and copying, the department shall substitute for the name of any physician which appears on the report, a unique identifying number. The identity of the physician shall constitute a confidential

record of the department. The department may set a reasonable per copy fee to cover the cost of making any copies authorized hereunder.

(3) Original copies of all reports filed under subsection (a) shall be available to the State Board of Medical Education and Licensure, and to law enforcement officials, for use in the performance of their official duties.

(4) Any person who willfully discloses any information obtained from reports filed pursuant to subsection (a), other than that disclosure authorized under paragraph (1), (2) or (3) hereof or as otherwise authorized by law, shall commit a misdemeanor of the third degree.

* * *

(h) Report of complications.—Every physician who is called upon to provide medical care or treatment to a woman who is in need of medical care because of a complication or complications resulting, in the good faith judgment of the physician, from having undergone an abortion or attempted abortion shall prepare a report thereof and file the report with the department within 30 days of the date of his first examination of the woman, which report shall be open to public inspection and copying and shall be on forms prescribed by the department, which forms shall contain the following information, as recieved, and such other information except the name of the patient as the department may from time to time require:

(1) Age of patient.

(2) Number of pregnancies patient may have had prior to the abortion.

(3) Number and type of abortions patient may have had prior to this abortion.

(4) Name and address of the facility where the abortion was performed.

(5) Gestational age of the unborn child at the time of the abortion, if known.

(6) Type of abortion performed, if known.

(7) Nature of complication or complications.
(8) Medical treatment given.
(9) The nature and extent, if known, of any permanent condition caused by the complication.

18 Pa. Cons. Stat. Ann. §§ 3211, 3214 (Purdon 1983).

2. Curriculum Vitae: Watson Allen Bowes, Jr.

Date of Birth:	March 28, 1934
Place of Birth:	Denver, Colorado
Social Security Number:	521-36-8704
Citizenship:	United States
Marital Status:	Married; six children

Present Position:
Professor, Department of Obstetrics and Gynecology
University of North Carolina School of Medicine

Present Address:
Division of Maternal and Fetal Medicine
Department of Obstetrics and Gynecology
214 MacNider Building 202H
University of North Carolina School of Medicine
Chapel Hill, North Carolina 27514

Education:
B.S., Washington and Lee University - 1955
M.D., University of Colorado School of Medicine - 1959

Licensure:
Colorado Board of Medical Examiners
License #13628, 1960
Board of Medical Examiners of North Carolina
License #25884, 1982

Academic Appointments:
Intern, Mary Hitchcock Memorial Hospital
1959-1960
Resident, General Practice
University of Colorado School of Medicine
1960-1961
Fellow, Obstetrics and Gynecology
Reproductive Physiology Laboratory
University of Colorado School of Medicine
1961-1962

Resident, Obstetrics and Gynecology
University of Colorado School of Medicine
1962-1965
Clinical Instructor, Obstetrics and Gynecology
University of Colorado School of Medicine
1965-1966
Assistant Professor, Obstetrics and Gynecology
University of Colorado Schoo. of Medicine
1966-1970
Major, U.S. Army Medical Corps
Madigan General Hospital, Tacoma, Washington
1967-1969
Associate Professor, Obstetrics and Gynecology
University of Colorado School of Medicine
1970-1976
Professor, Obstetrics and Gynecology
University of Colorado School of Medicine
1976-1982
Professor, Obstetrics and Gynecology
University of North Carolina School of Medicine
1982-

Certified:

American Board of Obstetrics and Gynecology
1967
American Board of Obstetrics and Gynecology
Division of Maternal-Fetal Medicine
1981

Major Scientific Interest:

High Risk Obstetrics

Other Activities and Honors:

Magna Cum Laude, Washington and Lee University, 1955
Upjohn Distinguished Professor of Obstetrics and Gynecology
February 1983-present
Phi Beta Kappa
Alpha Omega Alpha

Professional Societies:

1. American Association of Pro Life Obstetricians and Gynecologists
2. American College of Obstetricians and Gynecologists
3. American Gynecological and Obstetrical Society
4. Robert A. Ross Obstetrical and Gynecological Society
5. Society of Perinatal Obstetricians

Articles:

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2. Bruns, Bowes, Jr., Drose & Battaglia, *Effect of Respiratory Acidosis on the Rabbit Fetus in Utero,* 87 Am. J. Obstet. & Gynecol. 1074 (1963).
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4. Brazie, Ibbott & Bowes, Jr., *Identification of the Pigment in Amniotic Fluid of Erythroblastosis as Bilirubin,* 69 J. Pediatrics 354 (1966).
5. Battaglia, Meschia, Makowski & Bowes, Jr., *The Effect of Maternal Oxygen Inhalation upon Fetal Oxygenation,* 47 J. Clinical Investigation 548 (1968).
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7. Brazie, Bowes, Jr. & Ibbott, *An Improved Rapid Procedure for the Determination of Amniotic Fluid Bilirubin and its Use in the Prediction of the Course of Rh Sensitized Pregnancies,* 104 Am. J. Obstet. & Gynecol. 80 (1969).
8. Battaglia, Bowes, Jr., McGaughey, Makowski & Meschia, *The Effect of Fetal Exchange Transfusions with Adult Blood Upon Fetal Oxygenation,* 3 Pediatric Research 60 (1969).

9. Bowes, Jr., Gibson, Beibovitz & Palin, *Rubella Antibody Screening in a Prenatal Clinic Using the Indirect Fluorescent Antibody Test,* 35 Obstet. & Gynecol. 7 (1970).
10. Bowes, Jr., Brackbill, Conway & Steinschneider, *The Effects of Obstetrical Medication of Fetus and Infant,* 35 Monographs Soc. for Research Child Dev. (No. 4, 1970).
11. Sabol, Gibson & Bowes, Jr., *Pitressin Injection in Cervical Conization: A Double-Blind Controlled Study,* 37 Obstet. & Gynecol. 596 (1971).
12. Haverkamp & Bowes, Jr., *Uterine Perforation: A Complication of Continuous Fetal Monitoring,* 110 Am. J. Obstet. & Gynecol. 667 (1971).
13. Bowes, Jr., *Intrauterine Transfusion Indication and Results,* 14 Clinical Obstet. & Gynecol. 561 (1971).
14. Robinson, Bowes, Jr. & Droegemueller, *Intrauterine Diagnosis: Potential Complications,* 116 Am. J. Obstet. & Gynecol. 937 (1973).
15. Barton & Bowes, Jr., *Successful Pregnancy in a Patient with Severe Superior Vena Cava Syndrome,* 65 Chest 2 (1974).
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17. Kohler, Dubois, Merrill & Bowes, Jr., *Prevention of Chronic Neonatal Hepatitis B Virus Infection with Antibody to the Hepatitis B Surface Antigen,* 291 New Eng. J. Med. 1253 (1975).
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19. Kuhn, Duncan & Bowes, Jr., *Spontaneous Opening of Congenital Imperforate Hymen,* 87 J. Pediatrics 768 (1975).
20. Bowes, Jr., *Detection and Treatment of Tuberculosis,* 6 Contemp. Ob/Gyn 43 (1975).

21. Kowalski & Bowes, Jr., *Parent's Response to a Stillborn Baby,* 8 Contemp. Ob/Gyn 53 (1976).
22. Carson, Losey, Bowes, Jr. & Simmons, *Combined Obstetric and Pediatric Approach to Prevent Meconium Aspiration Syndrome,* 126 Am. J. Obstet. & Gynecol. 712 (1976).
23. Kowalski, Gottschalk, Greer & Bowes, Jr., *Team Nursing Coverage of Prenatal-Intrapartum Patients at a University Hospital: An Innovation in Obstetric Nursing,* 50 Obstet. & Gynecol. 116 (1977).
24. Bowes, Jr., *Results of the Intensive Perinatal Management of Very-Low-Birth-Weight Infants (501-1500),* in *Pre-Term Labour* 331 (A. Anderson, R. Beard, J. Brundenell & P. Dunn eds. 1977).
25. Carson, Simmons & Bowes, Jr., *Meconium Aspiration Syndrome Following Cesarean Section,* 130 Am. J. Obstet. & Gynecol. 596 (1978).
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27. Bowes, Jr., Taylor, O'Brien & Bowes, *Breech Delivery: Evaluation of the Method of Delivery on Perinatal Results and Maternal Morbidity,* 135 Am. J. Obstet. & Gynecol. 965 (1979).
28. Watson, Besch & Bowes, Jr., *Managment of Acute and Subacute Puerperal Inversion of the Uterus: A Case Controlled Study,* 55 Obstet. & Gynecol. 12 (1980).
29. Bowes, Jr., *Current Role of the Midforceps Operation,* 23 Clinical Obstet. & Gynecol. 549 (1980).
30. Bowes, Jr., *The Puerperium,* 23 Clinical Obstet. & Gynecol. (No. 4, W. Bowes, Jr. ed. 1980).
31. Bowes, Jr., Gabbe & Bowes, *Fetal Heart Monitoring in Premature Infants Weighing 1500 Grams or Less,* 22 Am. J. Obstet. & Gynecol. 549 (1980).
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33. Clewell, Dunne, Johnson & Bowes, Jr., *Fetal Transfusion with Real-Time Ultrasound Guidance,* 57 Obstet. & Gynecol. 516 (1981).
34. Bowes, Jr., *Delivery of the Very-Low-Birth-Weight Infant,* 8 Clinics Perinatology (No. 1, 1981).
35. Bowes, Jr. & Selgestad, *A Case of Fetal vs. Maternal Rights - The Modern Obstetrical Dilemma,* 58 Obstet. & Gynecol. 209 (1981).
36. Harvey & Bowes, Jr., *Maternal-Fetal Transport: Reflections on Experience at the University of Colorado Medical Center,* Perinatology-Neonatology 53 (Nov.-Dec. 1981).
37. Bowes, Jr., *Steps to Prevent Meconium Aspiration Syndrome,* 19 Contemp. Ob/Gyn 135 (1982).
38. Bowes, Jr., *A Review of Perinatal Mortality in Colorado, 1971-1978, and Its Relationship to the Regionalization of Perinatal Services,* 141 Am. J. Obstet. & Gynecol. 1045 (1981).
39. Clewell, Johnson, Meier, Newkirk, Zide, Hendee, Bowes, Jr., Hecht, O'Keefe, Henry & Shikes, *A Surgical Approach to the Treatment of Fetal Hydrocephalus,* 306 New Eng. J. Med. 1320 (1982).
40. Quirk, Jr. & Bowes, Jr., *Intrapartum Monitoring and Management of Low Birth Weight Fetus,* 9 Clinics Perinatology 363 (1982).
41. Fryer, Jr. & Bowes, Jr., *Factors Attracting Physicians to Rural Underserved Communities: The Case of Colorado,* 57 J. Med. Educ. 716 (1982).
42. Moore, Hershey, Johnigen & Bowes, Jr., *The Incidence of Pregnancy-Induced Hypertension Is Increased Among Colorado Residents of High Altitude,* 144 Am. J. Obstet. & Gynecol. 423 (1982).
43. Fryer, Jr. & Bowes, Jr., *In-State Experiences of Physicians Serving Rural Underserved Communities: The Case of Colorado,* 57 J. Med. Educ. 716 (1982).
44. Meier & Bowes, Jr., *Amniotic Fluid Embolus Like Syndrome Presenting in the Second Trimester of Pregnancy,* 61 Obstet. & Gynecol. 315 (1983).

45. Bowes, Jr., *Preventing Preterm Birth in the High-Risk Patient,* 8 Drug Therapy 33 (1983).
46. Bowes, Jr. & Fryer, Jr., *Rural Physicians and Continuing Education Programming,* 80 Colo. Med. (Mar. 1983).
47. Bowes, Jr., Fryer, Jr. & Ellis, *The Use of Standardized Neonatal Mortality Ratios to Assess the Quality of Perinatal Care in Colorado,* 148 Am. J. Obstet. & Gynecol. 1067 (1984).
48. Seeds, Cefalo, Herbert & Bowes, Jr., *Hydramnios and Maternal Renal Failure: Relief with Fetal Therapy,* 61 Obstet. & Gynecol. 265 (1984).
49. Seeds, Cefalo & Bowes, Jr., *Femur Length in the Estimation of Fetal Weight Less than 1500 Grams,* 149 Am. J. Obstet. & Gynecol. 233 (1984).
50. Seeds, Herbert, Bowes, Jr. & Cefalo, *Recurrent Idiopathic Fetal Hydrops: Results of Prenatal Therapy,* 64 Obstet. & Gynecol. 305 (1984).
51. Herbert, Seeds, Cefalo & Bowes, Jr., *Prenatal Detection of Intraamniotic Bands: Implications and Management,* Obstet. & Gynecol. (forthcoming).

Chapters in Books:

1. Droegemueller & Bowes, Jr., *Thrombophlebitis,* in *Current Therapy* (H. Conn ed. 1968).
2. Bowes, Jr., *The Placenta,* in *Care of the Well Baby* (K. Shepard ed. 1968).
3. Bowes, Jr. & Droegemueller, *Female Genitourinary System and Obstetrics,* in *Outpatient Surgery* ch. 20 (G. Hill ed. 1973).
4. Bowes, Jr. & Droegemueller, *Identification and Management of Intrauterine Growth Retardation,* in *Controversy in Obstetrics and Gynecology II* 10 (D. Reid & C. Christian eds. 1974).
5. Droegemueller & Bowes, Jr., *Thrombophlebitis,* in *Current Therapy* (H. Conn ed. 1974).

6. Jaffe, Schruefer, Bowes, Jr., Creasy, Sweet & Laros, Jr., *High Risk Pregnancies: Maternal Medical Disorders*, in 3 *Prevention of Embryonic, Fetal and Perinatal Disease* 27 (R. Brent & M. Harris eds. 1976) (DHEW Publication No. (NIH) 76-853).

7. Sever, Fuccillo & Bowes, Jr., *Environmental Factors: Infection and Immunizations*, in 3 *Prevention of Embryonic, Fetal and Perinatal Disease* 199 (R. Brent & M. Harris eds. 1976) (DHEW Publication No. (NIH) 76-853).

8. Robie & Bowes, Jr., *Immediate Resuscitation of the Newborn Infant*, in *Current Therapy in Obstetrics and Gynecology* 77 (E. Quilligan ed. 1980).

9. Bowes, Jr., *Obstetrical Emergencies*, in *Emergency Care* ch. 11 (J. Boswick, Jr. ed. 1981).

10. Bowes, Jr., *Pancreatitis*, in *Current Therapy in Obstetrics and Gynecology* (E. Quilligan ed. 1982).

11. Bowes, Jr., *Biochemical Testing-Estriols and Medical-Surgical Problems-Tuberculosis*, in *High Risk Pregnancy Protocols* (J. Queenan & J. Hobbins eds. 1982).

12. Bowes, Jr., *Intensive Obstetric Management of the Very-Low-Birth-Weight Infant*, in *Reid's Controversy in Obstetrics and Gynecology - III* (F. Zuspan & C. Christian eds. 1983).

13. Peterson & Bowes, Jr., *Drugs, Toxins and Environmental Agents in Breast Milk*, in *Lactation: Physiology, Nutrition and Breast-Feeding* (M. Neville & M. Neifert eds. 1983).

14. Bowes, Jr. & Watson, *Inversion of the Uterus*, in *Operative Perinatology, Invasive Obstetric Techniques* (L. Iffy & D. Charles eds. 1984).

15. Bowes, Jr., *Intensive Obstetrical Management of the Very-Low-Birth-Weight Infant*, in *Controversy in Obstetrics and Gynecology* (F. Zuspan & C. Christian eds., forthcoming).

Revised 1/85.

3. Curriculum Vitae: Richard T. F. Schmidt

Vital Statistics:

Born Sept. 23, 1918, Cincinnati, Ohio, of John J. and Elsa Wenning Schmidt

Married: Margaret Manchester 6-3-48

Children: Kristin Keye, 1950
Gregory John, 1952
Stephen Bruhl, 1956
John Joseph II, 1960

Education:

St. Xavier High School, graduated (first honors) 1936

Xavier University, B.S. cum laude 1940

Alpha Sigma Nu (national Jesuit college honorary society)

University of Cincinnati, M.D. Dec. 1943

Postgraduate Training:

Internship - University Hospitals of Cleveland (straight Ob-Gyn) 1944

Residency - University Hospitals of Cleveland, 1944-46 and 1948-49

Fellowship - Western Reserve University (teaching and Ob-Gyn liaison for major curriculum change) 1949-50

Military Service:

Army of the United States 1946-48

Chief, Womens' Division, Halloran General Hospital

Chief, Ob-Gyn Service, 183rd General Hospital

Specialty Board:

American Board of Obstetrics and Gynecology, certified 1953

Academic Appointments:

Demonstrator in Obstetrics and Gynecology, Western Reserve University, 1948-50

Instructor, Gynecology, University of Cincinnati, 1951-62

Assistant Clinical Professor, Gynecology, ibid., 1962-68
Assistant Clinical Professor, Obstetrics and Gynecology, 1968-71
Associate Clinical Professor, Obstetrics and Gynecology, 1971-75
Clinical Professor, Obstetrics and Gynecology, 1975—

Hospital Appointments:
Cincinnati General Hospital
Clinician, Gyn OPD, 1951—
Chief Clinician, Gyn OPD, 1965-69
Attending Gynecologist, 1962—
Good Samaritan Hospital
Courtesy Staff, 1950-51
Associate Attending Obstetrician & Gynecologist, 1951-56
Attending Obstetrician & Gynecologist, 1956
Director Residency Training in Ob-Gyn, 1963-66
Director Department of Obstetrics and Gynecology, 1966—
Christ Hospital - Courtesy Staff, 1951-59
Associate Attending Obstetrician & Gynecologist, 1959-70
Consulting Staff, 1971—
Bethesda Hospital - Courtesy Staff, 1951-56
Associate Attending, 1956-66

Professional Societies:
AMA. Ohio State Medical Association, Cincinnati Academy of Medicine - 1950
Cincinnati Obstetrical and Gynecological Society - 1953
Founding Fellow, American College of Obstetricians and Gynecologists, 1952
Fellow, American College of Surgeons, 1954
Central Association of Obstetricians and Gynecologists, 1955

Offices:
Treasurer, Cincinnati Obstetrical and Gynecological Society, 1959
President, Cincinnati Obstetrical and Gynecological Society, 1962
Executive Committee Central Association Obst. & Gynec., 1964-67
Vice-President, Central Association Obst. & Gynec., 1968-69
Executive Board, Good Samaritan Hospital - 1962-65 & 1966—
President, Good Samaritan Family Life Clinic - 1964-74
Treasurer, American College of Obstetricians and Gynecologists, 1971-77
Executive Board, American College of Obstetricians and Gynecologists, 1971-79
Executive Committee, American College of Obstetricians & Gynecologists, 1971-79
President, American College of Obstetricians and Gynecologists, 1977-78

Major Councils and Committees:
Chairman, Program Committee, ACOG, District V - 1957
Chairman, Program Committee, Central Association of Obstetricians and Gynecologists - 1965
Chairman, Program Committee, ACS, Ohio Section - 1969
Committee on Finance, ACOG - 1956-72, Chairman, 1965-70
Committee on Professional Standards, ACOG - 1970—, Chairman, 1971-75; Editor, *Standards for Obstetric & Gynecologic Services,* 1974
Committee on Biomedical Ethics, ACOG - 1974-77
Committee of Maternal and Child Care, AMA-1974-77, Chairman, 1976-77
Council on Scientific Affairs, AMA 1976-83
Chairman, Committee on Technology Assessment 1980-82

Council of Medical Specialty Societies, 1978-82
Chairman, Committee on Health Care Delivery
Committee on Graduate Medical Education
Committee on Interspecialty Cooperation
Health Care Commission, ACOG - 1979-82
American Board of Medical Specialties, 1979-82
Chairman, Interdisciplinary Mammography Conference, (NCI, ACP, ACR, ACOG, ACS, AMA, AAFP, CAP, AC Soc.) 1978
Panel on Alphafetoprotein Screening, AMA 1980
Health Policy Agenda, (AMA and 150 specialty and allied health groups) 1983—
Chairman, Medical Science Work Group
Steering Committee

Federal and Industrial:

DHEW, National Center for Health Statistics, Technical Consultant Panel, Revision of U.S. Standard Certificates 1975
Chairman, Technical Advisory Committee, AMA/DHEW, Surgical Criteria Project, Contract No. HCFA-500-78-0011
Consultant, Proctor & Gamble (Paper Products Division) 1980—
Panel On Reproductive Hazards in the Workplace, AMA and Industrial Physicians, 1982—

Community Activities:

Hospital Liaison Committee, Cincinnati Hospital Council - 1967
Cincinnati Health and Welfare Council - 1965
Budget Committee, Cincinnati Community Chest - 1959-61
Board of Trustees, Cincinnati Music Festival Association - 1964-69
Board of Trustees, Academy of the Sacred Heart - 1960-66
Board of Lay Advisors, St. Xavier High School - 1968-72

Board of Governors, Xavier University Alumni Association - 1960-63
Mens Symphony Committee - 1965-69
Executive Committee, Navy League Cincinnati Council - 1960-64

FILED
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ALEXANDER L. STEVAS,

No. 84-495

IN THE

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELLEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., AND FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF OLIVIA GANS, TERRYL CARLSON AND SUZI DEWING FOR APPELLANTS RICHARD THORNBURGH, ET AL.

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No. 84-495

IN THE

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELLEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., AND FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOTE

This Brief Amici Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF THE AMICI

The *amici* Olivia Gans, Terryl Carlson, and Suzi Dewing are women who procured abortions without being adequately informed of the nature of the abortion procedure, the medical risks involved, or the alternatives to abortion. The *amici* believe that if accurate information on the characteristics of their unborn children, the risks attendant on abortion, and the public and private agencies willing to assist them with childbirth, such as that prescribed by 18 PA. CONS. STAT. §§3205(a) and 3208, was made available to them at the time they sought their abortions, they would have decided against the procedure.

Olivia Gans obtained an abortion in New Jersey in 1981 at the insistence of her boyfriend. She spoke with four doctors and a Planned Parenthood counselor before undergoing the abortion, none of whom encouraged her to think about her decision and make her own choice. She heard only a cursory description of the abortion procedure, and the unborn baby was referred to merely as a "complication." By her own count she was 13-14 weeks pregnant, but she was told by the physician who performed the abortion that she was only in the third month of her pregnancy. No mention was made of any medical risks or possible psychological consequences of abortion.

Miss Gans' abortion was performed without anesthesia, yet she was not warned beforehand about the pain the procedure would entail. The method utilized was suction aspiration even though, as Miss Gans learned later, that procedure poses particular danger of bleeding and incomplete removal of the fetus for a woman more than twelve weeks pregnant. The cursory pelvic exam given her a week later was inadequate to detect possible uterine scarring or fallopian tube blockage resulting from an abortion, and Miss Gans does not know whether she suffered any long-term adverse physical effects. She has felt some of the psychological damages of an abortion: she found it difficult to hold a baby for two years after her

experience, and she has noted an inability to relax and relate romantically to a man.

Miss Gans now believes that if she had been given information on the development of her unborn child, on the risks accompanying a second-trimester abortion, and on the availability of childbirth assistance for a single woman like herself, she would not have proceeded with the abortion. Thus, in her view, her consent to her abortion was not an informed consent, and her decision to abort her unborn child was not the decision she would have made had she been fully informed.

Terryl Carlson was a 27-year-old single parent living in Idaho when she became pregnant with a third child in 1979. She was personally opposed to abortion, but was unable to bear the expenses associated with the birth of a baby. She unsuccessfully sought childbirth assistance from several feminist and governmental organizations. No one mentioned that as a full-time student without income who was already receiving Aid to Families with Dependent Children, she was probably eligible for childbirth assistance through Medicaid. She was told that she would be responsible for all childbirth medical expenses unless she gave the child up for adoption. She did not feel that adoption was an option for her because of the effect she feared it would have on her other two young children. Her student health insurance would pay for 75% of the cost of an abortion ($150.00), but would pay only $250.00 toward childbirth costs. She consulted her physician and was told that an abortion would entail no adverse consequences for her and that the fetus was simply a "mass of cells." Feeling that no other course of action was possible for her, she made a hasty decision to abort in the sixth or seventh week of her pregnancy. However, Miss Carlson remained uneasy about her decision and contemplated refusing the abortion even as she was being prepared for the procedure. She did not realize that the abortion was underway until she inquired about the vacuum noise she was hearing and was told it was

the sound made by the suction curettage machine which was being used to perform the abortion. She became hysterical when she realized it was too late to refuse the abortion.

Miss Carlson suffered serious post-abortion gynecological problems for four years. The additional psychological consequences of her abortion included guilt, anger, depression, loss of self-esteem, and suicidal tendencies. She feels that if printed materials documenting the development of the fetus and the risks of abortion had been made available to her, she would have read them and realized the fetus was not the mere "mass of cells" nor abortion the innocuous procedure she had been led to believe. Most significantly, because her financial situation was one of the major factors in her decision to abort, Miss Carlson would have been anxious to review any information on childbirth assistance and paternal responsibility. In sum, Miss Carlson asserts that disclosure of the information required by 18 PA. CONS. STAT. §§3205(a) and 3208 would have provided her with a factual basis for refusing the abortion and finding the means to give birth to her baby, which was her initial and overall desire.

Suzi Dewing became pregnant in 1976, a few months before her wedding date. Her mother, her fiance, and the doctor who discovered her pregnancy all advised her to have an abortion. She was told nothing about the abortion procedure, any possible adverse consequences, or the development of the unborn child during her pregnancy. It was not until she was on the operating table at the abortion clinic that her doctor asked her, "Would you like me to explain the procedure?" Mrs. Dewing passed out from pain while her cervix was being dilated and never heard the explanation.

The abortion was followed by adverse psychological and physiological consequences for Mrs. Dewing. She felt a desperate need to replace the baby she had aborted. She

moved her wedding day up in order to have another child earlier. However, her two subsequent pregnancies ended with mid-term miscarriages, as did a third pregnancy which followed two successful but complicated pregnancies. These miscarriages were accompanied by feelings of guilt and fear that she was being punished for her abortion.

Mrs. Dewing believes that, had she been informed about the alternatives available to her and the risks and consequences of abortion, her decision would have been different. Specifically, the public and private assistance available for childbirth would have alleviated the insecurity and anxiety of bearing the child without the approval of her family and fiance. Knowledge of the possibility that an abortion could affect her subsequent childbearing ability would have immediately dissuaded her from having an abortion, because a family was important to her. Likewise, if the development of the unborn child inside her had been explained to Mrs. Dewing, she would not have succumbed to the pressure to abort. In summary, Mrs. Dewing believes that if she had received the information required by 18 PA. CONS. STAT. §§3205(a) and 3208, she would not have chosen to abort.

BRIEF AMICI CURIAE NOTE

The Questions Presented and The Statement of the Case are omitted from this Amici Curiae Brief since they are amply stated in the Appellants' Brief of Richard Thornburgh, et al.

STATUTES INVOLVED

The text of 18 PA. CONS. STAT. §§3205(a)(2) and 3208 is set forth in Appendix A.

SUMMARY OF ARGUMENT

The constitutional right of a woman to choose to terminate her pregnancy includes "at least an equal right to choose to carry her fetus to term as to choose to abort it." *Maher v. Roe*, 432 U.S. 464, 472 n. 7 (1977). The Pennsylvania legislature has a legitimate and compelling interest in protecting the exercise of this fundamental constitutional right to choose by ensuring that any woman exercising the right has the opportunity to be fully informed in making her choice. Toward that end, the legislature enacted 18 PA. CONS. STAT. §§3205(a)(2) and 3208, requiring an abortion practitioner to inform a pregnant woman that medical childbirth assistance benefits may be available to her, that the father is liable for support of the child, and that printed materials are available describing the unborn child and listing agencies offering alternatives to abortion. The information to be disclosed is similar to that held "not objectionable" in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

Because of the contractual, consumer-oriented nature of medical practice in general, and abortion practice in particular, the information supplied by a physician to his patient is a form of "commercial speech" subject to reasonable regulation by the state pursuant to its interest in protecting consumers from deception. The principles recently expounded by this Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 U.S.L.W. 4587 (May 28, 1985) are thus applicable in assessing the constitutionality of Pennsylvania's disclosure requirements. In *Zauderer*, Ohio had required attorneys "to provide somewhat more information than they might otherwise have been inclined to present" in advertising for contingency-fee clients. The disclosure requirement was upheld by this Court because it was not unduly burdensome or intrusive, it did not prescribe unorthodox speech, and it was reasonably related to the state's interest in preventing

consumer deception. Those criteria are met by the Pennsylvania disclosure requirements.

Most significantly, Pennsylvania's regulation of the "commercial speech" attending abortion is entirely consistent with the informed consent doctrine requiring disclosure of relevant facts prior to a patient's decision to undergo treatment. Specifically, the requirements of sections 3205(a)(2) and 3208 reflect Pennsylvania's decision to apply a "patient autonomy" standard of disclosure in all medical practice, including abortion practice. This standard, which has also been adopted by a substantial minority of other states, focuses on the information which a reasonable patient would consider significant in making a decision to undergo medical treatment.

In holding Pennsylvania's disclosure requirements unconstitutional, the court below in effect held that Pennsylvania must adhere to a "physician paternalism" standard of disclosure in the abortion context, as determined by the usual disclosure practices of physicians in similar circumstances. However, if the "patient autonomy" approach is constitutional as applied to medical treatment in general, it should be equally constitutional as applied to abortion. Moreover, "when an issue involves policy choices as sensitive as those implicated [here]..., the appropriate forum for their resolution in a democracy is the legislature." *Maher v. Roe*, 432 U.S. at 479.

ARGUMENT

This brief is concerned with the sole issue of whether or not 18 PA. CONS. STAT. §§3205(a)(2)* and 3208 are facially unconstitutional. Your *amici* argue that the Court of Appeals erred in precipitously holding these provisions

*The court below apparently struck down §3205 as a whole, along with §3208, because of its finding of non-severability of those informed consent provisions which it deemed unconstitutional. This brief focuses on the constitutionality of the provisions of §§3205(a)(2) and 3208.

constitutionally infirm in *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984). They concede that the 24-hour waiting period required by section 3205(a)(2) is unconstitutional under *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), but assert that the waiting period requirement is plainly severable from the remainder of this section.

I. THE INFORMATION TO BE DISCLOSED UNDER SECTION 3205(a)(2) IS "NOT OBJECTIONABLE" UNDER *AKRON*

As Judge Seitz in dissent observed, the information provided by Section 3205(a)(2) is "similar" to information this Court held "not objectionable" in *Akron*. *Thornburgh*, 737 F.2d at 313 (Seitz, J., dissenting), quoting *Akron*, 462 U.S. at 445 n. 37. Section 3205(a)(2)(i) and (ii) require that the woman be informed that medical assistance benefits might be available to her if she chooses to carry her child to term, and that the father is economically liable should she choose to do so.

This information on medical assistance benefits and paternal responsibility provided by section 3205(a)(2)(i) and (ii) cannot be fairly said to be sufficiently burdensome or *in terrorem* to cross the line this Court drew between permissible information designed "to inform the woman's consent" and impermissible information designed to "persuade her to withhold it altogether." *Akron* 462 U.S. at 444.

Section 3205(a)(2)(iii) merely requires that the woman be informed of the existence of printed information on abortion alternative agencies and on fetal development, that these materials be provided at the woman's request, and that the woman be assisted in interpreting these materials should she decide that they would be valuable in reaching a decision. It does *not* require the physician or his

agent to recite a "litany of information" regardless of its relevance to the particular patient, as the ordinance at issue in *Akron* would have done. *See Akron*, 462 U.S. at 445. To the contrary, section 3205(a)(2)(iii) initially requires only that the physician or his agent inform the woman of the *availability* of materials on fetal development and abortion alternatives—materials that the woman may choose to inspect or not as she so desires. Moreover, neither the physician nor his agent is required to present the state-produced information as though it represented his own knowledge or views, and indeed they may criticize, comment on, or recommend against inspection of these materials at will.

These provisions are unconstitutional under *Akron*, then, only if one or the other or all contain information that the physician can withhold because he does not believe "the information is relevant to [the woman's] personal decision." *Id.* Knowledge of such information would obviously be relevant to the abortion decisions of at least some women, as the experience of the *amici* attests.

II. AS DISCLOSURE REQUIREMENTS REGULATING COMMERCIAL SPEECH, SECTIONS 3205(a)(2) AND 3208 ARE REASONABLY RELATED TO THE STATE INTEREST IN PREVENTING DECEPTION OF ABORTION CONSUMERS AND IN ASSURING INFORMED CONSENT TO ABORTION

In the highly commercialized and deeply politicized context of abortion practice, it is simply unrealistic to rely on abortion providers to willingly provide information such as that prescribed by section 3205(a)(2) to women contemplating abortion, even though it might be essential to their informed decision making. Indeed, the uncontroverted conclusion of the Pennsylvania legislature, after extensive hearings and debates, is to the contrary:

> Reliable and convincing evidence has compelled the General Assembly to conclude and the General Assembly does hereby solemnly declare and find that...[m]any women now seek or are encouraged to undergo abortions without full knowledge of the development of the unborn child or of alternatives to abortion.

18 PA. CONS. STAT. §3202(b)(1). In view of this factual context, and because of the very limited nature of the disclosure requirements of section 3205(a)(2), this Court's recent opinion in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 U.S.L.W. 4587 (May 28, 1985), is controlling in determining the constitutionality of this provision.

The contractual nature of the physician-patient relationship and the degree to which disclosure requirements have been traditionally imposed on medical practice plainly indicate that the information that physicians provide to patients in order to secure consent to treatment (for which physicians often reap considerable financial rewards) is commercial in nature. Since that information is "commercial speech," it is subject to considerably greater regulation than speech that is not a vehicle of information directly leading to decisions to purchase goods or services. Indeed, because the extension of constitutional protection "to commercial speech is justified principally by the value to consumers of the information speech provides, *see Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), ...[the] constitutionally protected interest in *not* providing any particular factual information is minimal." *Zauderer*, 53 U.S.L.W. at 4594 (emphasis in original).

In *Zauderer*, this Court held that the Ohio Supreme Court could properly discipline an attorney for failure to disclose the possible significant litigation costs of an unsuccessful lawsuit in his advertisement seeking clients

for contingency-fee-based suits for damages resulting from use of the Dalkon Shield intrauterine device. Just as in *Zauderer* where "Ohio [had] not attempted to prevent attorneys from conveying information to the public...[but] only required them to provide somewhat more information than they might otherwise have been inclined to present," *Id.* at 4594, Pennsylvania in the instant case does not seek to prevent the physician from presenting his views on abortion or its alternatives, but merely requires that he let his patient know certain additional information that might be critical in arriving at an informed abortion decision and which the physician would not otherwise be inclined to present.

As in *Zauderer*, Pennsylvania has not attempted to prescribe for the physician, his agent, or the woman contemplating abortion "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*, quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The counseling procedure that precedes abortion is certainly analogous to the "counsel" or representations in advertising that an attorney provides to his potential client on the nature and consequences of engaging the attorney to sue, the matter at issue in *Zauderer*; the factual information prescribed by section 3208 is intended to be "objective, non-judgmental and designed to convey only accurate...information." From this perspective, Pennsylvania, like Ohio in *Zauderer*, has "attempted only to prescribe what is orthodox" in the representations made to the woman prior to abortion, which are in the nature of commercial speech or advertising, "and its prescription has taken the form of a requirement that...[abortion practitioners] include...purely factual and noncontroversial information" in their representations to women contemplating abortion. *See Zauderer*, 53 U.S.L.W. at 4594.

As this Court observed in *Zauderer*, "unjustified and unduly burdensome disclosure requirements" might be deemed constitutionally impermissible. *Id.* The detailed and restrictive disclosure requirements imposed by the ordinance at issue in *Akron* might be so characterized, but the requirements of sections 3205(a)(2) and 3208 are far less intrusive and far more permissive. Moreover, like the disclosure requirement upheld in *Zauderer*, the disclosure required by section 3205(a)(2) is reasonably related to the state's interest in preventing deception of consumers. As the Pennsylvania legislature concluded, women are often deprived of information on abortion alternatives and fetal development when making abortion decisions. 18 PA. CONS. STAT. §3202(b)(1). A requirement that just such information be provided or made available to the woman is thus "reasonably related" to insuring against intentional or negligent deceptive counseling practices that might lead the woman to procure an abortion that she would not have otherwise chosen. It is, therefore, constitutional.

III. CONSIDERING SECTIONS 3205(a)(2) AND 3208 AS REASONABLE DISCLOSURE REQUIREMENTS REGULATING COMMERCIAL SPEECH IS FULLY CONSISTENT WITH THE "INFORMED CONSENT" DOCTRINE AS APPLIED TO OTHER AREAS OF MEDICAL PRACTICE

By enacting sections 3205(a)(2) and 3208, Pennsylvania imposed specific "informed consent" requirements on abortion practice. This legislation hardly represents unique imposition of state authority on the spoken or written disclosures that physicians are generally required to make in order to secure the consent of their patients to medical treatment of all kinds. Both the legislatures and the courts of the several states and the federal government impose disclosure requirements on physicians to assure that full and complete information is provided to patients prior to medical treatment.

Unless abortion is deemed an utterly unique medical procedure, the extent to which the state can properly regulate the "commercial speech" that attends abortion must be determined in the context of the degree to which the state generally imposes disclosure requirements on medical practice. Since providing abortion services is at least as much a commercial enterprise as any other area of medical practice, and since many other areas of medical practice implicate rights and interests of equal or greater import to the individual and the state, it would be anomalous to impose some higher standard on regulation of the "commercial speech" that attends abortion than on regulation of the speech that attends other medical practices. The holding of the Third Circuit presents such an anomaly.

The requirement of section 3205(a)(2) that the physician disclose the availability of medical assistance benefits, enforceability of paternal support, and information on fetal development and abortion alternatives permits the *woman* to decide whether such information is relevant. In striking this provision, the Third Circuit imparts to the physician the privilege to withhold potentially critical information on the theory that the woman has a right to rely on her physician's "medical judgment" in making a decision that is an exercise of *her* right of privacy. But it is plain that such withholding of information by the physician would have nothing whatever to do with "medical" judgment.

Moreover, the Third Circuit's opinion neglects entirely the controversy that commentators, courts, and legislators are currently engaged in over what ought to be the standard of disclosure for medical treatment of any kind. Indeed, it would impose on Pennsylvania and several other states a standard of disclosure that is contrary to the standard that their courts and legislature have determined to apply to medical practice generally and with which the requirements of sections 3205(a)(2) and 3208 are fully consistent.

IV. CONSIDERATION OF THE CONTROVERSY BETWEEN THE "PHYSICIAN PATERNALISM" AND THE "PATIENT AUTONOMY" APPROACHES TO INFORMED CONSENT IS CRITICAL TO EVALUATING THE PERMISSIBLE SCOPE OF GOVERNMENTAL REGULATION OF THIS FORM OF COMMERCIAL SPEECH

The debate over what standard ought to govern disclosures the physician must make to his patient in order to receive informed consent concerns two competing perspectives.

One perspective, which emphasizes physician discretion and judgment, may be called the "physician paternalism" approach. Its proponents say that the standard of disclosure ought to be that practiced by physicians in the locality. This approach, like that taken by the Third Circuit in this case, assumes that doctors generally know what is best for their patients, and gives doctors, as a group, great leeway to circumscribe the breadth and scope of the information to be disclosed to or withheld from the patient.

The other perspective, which emphasizes patient knowledge and decision, may be called the "patient autonomy" approach. Its proponents say that the standard of disclosure ought to be what an average, reasonable patient would consider material to the decision, regardless of what physician practice may be. This approach assumes that competent adults should be enabled to determine for themselves what is done with their bodies, and places the premium on patient freedom of choice.

Pennsylvania law clearly follows the "patient autonomy" approach to informed consent to medical treatment. *Jeffries v. McCague*, 242 Pa. Super. 76, 362 A.2d 1167 (1976); *Bowers v. Garfield*, 382 F. Supp. 503 (E.D. Pa. 1974); *Copper v. Roberts*, 220 Pa. Super. 260, 286 A.2d 647 (1971); *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966).

Indeed, failure to secure informed consent is considered an intentional tort ("a technical assault") in Pennsylvania, rather than an expression of negligence. *See, e.g., Jeffries*, 363 A.2d at 1171.

At the same time, informed consent to medical treatment is deemed to be "an area basically governed by contractual concepts." *Copper*, 286 A.2d at 650. The consumer-oriented, contractual approach to informed consent demands that, because "the patient must bear the expense, pain and suffering of any injury from the . . . treatment, his right to know all the material facts pertaining to the proposed treatment cannot be dependent upon the self-imposed standard of the medical profession." *Id.* Thus, the medical profession's "community of silence" is not permitted to deny the patient any material facts needed to make an informed decision under Pennsylvania law.

Pennsylvania clearly follows this same approach with regard to abortion. The legislature chose not to defer to the abortion-performing physician's view of what is best and allow him or her to control the flow of information to the patient, as under the "physician paternalism" approach. Rather, the legislature proceeded on the assumption that abortion is an especially personal decision, to be made by the woman herself, and sought to assure her of access to the information material to that decision, thus employing the rationale behind the "patient autonomy" approach.

Without any discussion of the arguments which have been advanced for and against each approach, or of the relation of constitutional provisions to those arguments, the Third Circuit, in striking sections 3205(a)(2) and 3208, in effect held that, at least in the context of abortion, the Constitution imposes on the States the "physician paternalism" option and forbids to them the "patient autonomy" approach. The ruling prohibits the state from regulating the "commercial speech" that attends abortion by applying as the standard of disclosure what the average,

responsible abortion patient might want to know in order to make a competent abortion decision. Instead, according to the Third Circuit, the physician, as a matter of constitutional law, has a right to withhold information from the abortion patient if abortion practitioners customarily do so. In view of Pennsylvania's strong adherence to the doctrine of "patient autonomy," this holding creates an anomaly in Pennsylvania law: abortion practitioners may operate on an altogether different standard of disclosure than physicians in all other circumstances.

In the belief that no final ruling on the application of the Constitution to informed consent requirements for abortion should be made without at least some consideration of the nature of informed consent requirements for medical treatment in general, your *amici* offer the remainder of this brief for the limited purpose of reviewing the two competing approaches to informed consent disclosure standards and the relevance of those approaches to the validity of legislative judgments about what standard best achieves effective freedom of choice for women deciding whether to undergo abortion.

We address what should be a central issue in this case: whether, in light of the considerable controversy over the respective wisdom of the "physician paternalism" and "patient autonomy" approaches, this Court should adopt a rule that constitutionally freezes the "physician paternalism" approach as the only allowable model for abortion related informed consent legislation, or whether, "when an issue involves policy choices as sensitive as those implicated [here] ..., the appropriate forum for their resolution in a democracy is the legislature." *Maher v. Roe*, 432 U.S. 464, 479 (1977).

Pennsylvania's treatment of the "commercial speech" that attends abortion is fully consistent with the "patient autonomy" approach it takes toward informed consent to

all other medical procedures. This Court should not carve out a special doctrine for the commercial speech attending abortion that is contrary to the expressed preference of Pennsylvania and several states for patient autonomy, as well as to this Court's holding in *Zauderer* that the State may constitutionally require disclosure of potentially critical information in a similar commercial setting.

A. Medical Treatment Requires the Consent of the Patient, and the Universal Modern Rule Is That the Consent Must Be Informed

Under Anglo-American law, it is axiomatic that a physician must first obtain the patient's consent before undertaking any non-emergency treatment. As Justice Cardozo stated in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914):

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages.

As the consent doctrine evolved, it became necessary under the law for the physician not only to obtain permission to proceed, but also to make a reasonable disclosure to the patient of the nature and probable consequences of the proposed treatment. *See Salgo v. Stanford University Bd. of Trustees*, 154 Cal. App.2d 560, 317 P.2d 170 (1957), the landmark case introducing the principle. "Numerous courts throughout the 1960's looked beyond the fact of the patient's consent to question the quality of the physician's disclosure underlying the consent." A ROSOFF, INFORMED CONSENT 4 (1981). Some version of the informed consent requirement is now in effect in all but one of the United States. *See* Table of Current Positions on the Approach to Informed Consent by State, this brief at 22.

B. The Older "Physician Paternalism" Approach Has Been Replaced by the Newer "Patient Autonomy" Approach in Pennsylvania and a Substantial Number of Other States

When the informed consent doctrine first came to be applied in the late 1950's and early 1960's, it was initially analyzed in the manner of traditional medical malpractice tort negligence. Like the duty of care by which deviations amounting to negligence are measured, the duty of disclosure by which deviations amounting to denial of informed consent were to be measured was set as "those disclosures which a reasonable medical practitioner would make under the same or similar circumstances." *Natanson v. Kline*, 186 Kan. 393, 409-10, 350 P.2d 1093, 1106 (1960). This approach came to mean that a physician need only disclose those facts which the average, reasonable practitioner, of the same speciality and geographic location, would have revealed under similar circumstances. Victor, *Informed Consent*, 1981 MEDICAL TRIAL TECH. 138, 146. *See, e.g., Woolley v. Henderson*, 418 A.2d 1123, 1128-32 (Me. 1980).

Courts first began to move away from this approach in dealing with elective surgery—a category into which most abortions fall. For example, in *Scott v. Wilson*, 396 S.W.2d 532 (Tex. Civ. App. 1965), *aff'd sub nom. Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967), the court held that when a patient is considering an elective operation, a physician has the duty to make a full disclosure of the nature of the operation, the process contemplated, the dangers of the operation and possible alternatives to the treatment.

The full introduction of the "patient autonomy" approach into case law came in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), which remains the leading case. The D.C. Circuit concluded that "[r]espect for the patient's right of self-determination on particular therapy demands a standard set by law for

physicians rather than one which physicians may or may not impose upon themselves." *Id.* at 780. It based its decision on the premise that "it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests lie," and that the duty to disclose information important for that determination is not "dependent upon the existence and nonperformance of a relevant professional tradition." *Id.* at 777, 779.

Instead of usual professional practice, therefore, the court concluded:

> [T]he patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision.

Id. at 782-83.

The *Canterbury v. Spence* "patient autonomy" approach came to be followed by a substantial minority of jurisdictions. Adopting the position, a Maryland court summarized the trend:

> In recent years...an ever-expanding number of courts have declined to apply a professional standard of care in informed consent cases, employing instead a general or lay standard of reasonableness set by law and independent of medical custom. These decisions recognize that protection of the patient's fundamental right of physical self-determination—the very cornerstone of the informed consent doctrine—mandates that the scope of a physician's duty to disclose...be governed by the patient's informational needs. Thus, the appropriate test is not what the physician in the exercise of his medical judgment

> thinks a patient should know before acquiescing in a proposed course of treatment; rather, the focus is on what data the patient requires in order to make an intelligent decision.

Sard v. Hardy, 281 Md. 432, 442, 379 A.2d 1014, 1021 (1977). *See also* Victor, *supra* p. 20, at 148; Seidelson, *Medical Malpractice: Informed Consent Cases in "Full Disclosure" Jurisdictions*, 14 DUQ. L. REV. 309, 312 (1976).

The following table summarizes the 1985 positions on standards of disclosure of the District of Columbia, Puerto Rico, and the 50 states. Twenty-eight of the jurisdictions with positions adopt an approach differing from the pure "physician paternalism" model which the Third Circuit implicitly held to be the only approach the Constitution accepts when applied to "commercial speech" attending abortion. Pennsylvania strongly insists on application of the patient autonomy rule. *See* this brief at 16. The newer "patient autonomy" approach, therefore, is seen to be an approach accepted and advocated by a substantial minority of states for reasons closely related to the essential basis of the informed consent doctrine. This understanding counsels against pre-empting Pennsylvania's legislative choice through the establishment of a constitutional rule compelling "physician paternalism."

TABLE OF CURRENT POSITIONS ON THE APPROACH TO INFORMED CONSENT BY STATE*

State	No Law	Patient Autonomy	Physician Paternalism	Hybrid
Alabama[1]			X	
Alaska[2]				X
Arizona[3]			X	
Arkansas[4]			X	
California[5]				X
Colorado[6]			X	
Connecticut[7]		X		
Delaware[8]			X	
District of Columbia[9]		X		

Florida[10]				X
Georgia[11]			X	
Hawaii[12]			X	
Idaho[13]				X
Illinois[14]			X	
Indiana[15]				X
Iowa[16]				X
Kansas[17]			X	
Kentucky[18]				X
Louisiana[19]	X			
Maine[20]			X	
Maryland[21]	X			
Massachusetts[22]				X
Michigan[23]			X	
Minnesota[24]	X			
Mississippi[25]			X	
Missouri[26]			X	
Montana[27]			X	
Nebraska[28]			X	
Nevada[29]				X
New Hampshire[30]			X	
New Jersey[31]			X	
New Mexico[32]		X		
New York[33]			X	
North Carolina[34]				X
North Dakota[35]				X
Ohio[36]		X		
Oklahoma[37]		X		
Oregon[38]		X		
Pennsylvania[39]		X		
Puerto Rico[40]			X	
Rhode Island[41]		X		
South Carolina[42]			X	
South Dakota[43]	X			
Tennessee[44]			X	
Texas[45]		X		
Utah[46]			X	
Vermont[47]				X
Virginia[48]			X	
Washington[49]		X		
West Virginia[50]		X		
Wisconsin[51]		X		
Wyoming[52]			X	
TOTAL	1	15	24	12

*The sources for this summary are given by state in Appendix B.

C. Sections 3205(a)(2) and 3208 Apply the "Patient Autonomy" Approach to Abortion

Sections 3205(a)(2) and 3208 provide for disclosure concerning the availability of medical assistance benefits, paternal support, and printed information on abortion alternatives and fetal development. It was logical for Pennsylvania to consider these categories to be material to the decision whether or not to undergo an abortion. Since materiality to the decision is the standard for disclosure employed by states such as Pennsylvania which have adopted the "patient autonomy" approach, disclosure with regard to these categories lies fully within the bounds of informed consent doctrine.

> Over the 20-odd years since the term informed consent came into usage in the medicolegal context, courts have been developing, on a case-by-case basis, a list of items requiring disclosure. Stated in simple, generic terms, the list includes:
>
> * diagnosis (i.e., the patient's condition or problem)
> * nature and purpose of the proposed treatment
> * risks and consequences of the proposed treatment
> * probability that the proposed treatment will be successful
> * feasible treatment alternatives
> * prognosis if the proposed treatment is not given.

ROSOFF, *supra* p. 19, at 41 (emphasis in original).

The disclosures required by sections 3205(a)(2) and 3208 fit within these categories. Disclosure of medical assistance benefits, paternal support, and the availability of printed information on abortion alternatives plainly relates to "feasible treatment alternatives"—the nature of the financial and other support the woman might have available should she choose to carry her child to term rather than to abort. So long as the "patient autonomy"

approach is accepted as a constitutionally available alternative to the "physician paternalism" approach, "commercial speech" disclosure requirements in these categories can hardly be objectionable.

It has been suggested, however, that disclosure of information concerning the characteristics of the fetus, such as that made available under sections 3205(a)(2) and 3208, "is not directly material to any medically relevant fact, and thus does not serve the concern for providing adequate medical information that lies at the heart of the informed consent requirement." *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1021 (1st Cir. 1981). This perception misconceives both the nature of the standard of disclosure in informed consent doctrine—at least under the "patient autonomy" approach—and the meaning of "medically relevant" in the context of abortion as that concept has been delineated by this Court.

"[T]he very basis of the informed consent theory [is] the patient's right to be the final judge to do with his body as he wills." *Wilkinson v. Vesey*, 110 R.I. 606, 625, 295 A.2d 676, 688 (1972). Central to this position is the view that the "decision about what is or is not relevant information upon which a patient can base an informed consent is a human judgment, not a determination requiring medical expertise." Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L.J. 1533 (1970). *Accord, Wilkinson*, 295 A.2d at 688. From the "patient autonomy" perspective, therefore, the nature of the information deemed material to the patient's decision is not inherently limited to a description only of physical health risks associated with the procedure; rather, the question of materiality is, as a Washington court phrased it, "Would the patient as a human being consider this item in choosing his or her course of treatment?" *Miller v. Kennedy*, 11 Wash. App. 272, 282-283, 522 P.2d 852, 860 (1974), *aff'd*, 85 Wash.2d 151, 530 P.2d 334 (1975).

It is simply disingenuous to argue that information about the fetus is irrelevant to a choice about abortion, and that the only things "the patient as a human being [would] consider" in making a reflected choice whether to undergo it are physical health risks. As this Court noted in *Roe v. Wade*, 410 U.S. 113, 116 (1973), "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, ...one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion." That network of values revolves around the attitude one takes toward the fetus's status and prospects as weighed together with the needs and plans of the pregnant woman and perhaps her family. If, as Laurence Tribe has suggested, "*Roe v. Wade* represents less a decision in favor of abortion than a decision in favor of leaving the matter, however it might come out in particular cases, to women...," L. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 (1978), then it cannot properly be said that the whole tangle of ethical and human issues inherently associated with abortion are to be deemed irrelevant to women's decisionmaking. Those issues are inextricably bound up with the existence and nature of the fetus.

Thus, the notion that information on fetal development is "medically irrelevant" is mechanistically narrow in a manner at odds with this Court's delineation of that concept in the context of abortion. "[M]edical judgment," this Court has held, "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). This sense of the medically relevant is certainly broader than merely physical complications; it argues against the exclusion of fetal information from the realm of the "medical."

The applicability of the "patient autonomy" informed consent rationale is not diminished because information about the fetus has no precise analogue in information required to be disclosed about other medical procedures. "The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life." *Maher v. Roe*, 432 U.S. at 480. The essential point is that the rationale for the disclosure of fetal information is the same as that for the disclosure of information associated with medical treatments other than abortion: in the "patient autonomy" view, disclosure should be made of "what the patient would consider important to [her] decision." *Canterbury v. Spence*, 464 F.2d at 783.

The requirement of section 3205(a)(2)(iii) merely permits the woman to decide whether *she* considers the information on fetal development important enough to her decision to view it. Only a most paternalistic view of the abortion decision—a view otherwise forthrightly and uniformly rejected by Pennsylvania—would presume to deny the woman the right to know that such materials even exist.

In sum, the disclosures required by sections 3205(a)(2) and 3208 are rooted in the philosophy that underlies the "patient autonomy" approach to informed consent used by a respectable minority of the States, including Pennsylvania: "The patient has the right to chart [her] own destiny, and the doctor must supply the patient with the material facts the patient will need in order to intelligently chart that destiny with dignity." *Miller v. Kennedy*, 522 P.2d at 860. The requirement to disclose information about medical assistance benefits, paternal support, and the existence of materials on alternatives to abortion and the characteristics of the fetus is medically relevant and fits appropriately into the "patient autonomy" informed consent doctrine.

D. From a "Patient Autonomy" Perspective, There is Ample Precedent and Reason for Providing No "Therapeutic Exception" in Section 3205(a)(2)

Section 3205(a)(2) requires disclosure in all non-emergency instances. It thus parts company with the rule in some "patient autonomy" jurisdictions—significantly, not in Pennsylvania*—which holds that a physician has a limited privilege not to disclose information to a patient for "therapeutic" reasons. The privilege is an exception to the general duty of disclosure, and is not recognized by several states. This exception, where it is recognized, is meant to deal with occasions when disclosure would risk making a patient "so ill or emotionally distraught . . . as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient." *Canterbury v. Spence*, 464 F.2d at 786. The *Canterbury* court itself warned, however, that the therapeutic exception

> must be carefully circumscribed . . . for otherwise it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels the patient really needs. That attitude presumes instability or perversity even for the normal patient, and runs counter to the foundation principle that the patient should and ordinarily can make the choice for himself.

Bulman v. Myers, 467 A.2d 1355 (Pa. Super. 1983); *Sauso v. Shea*, 390 A.2d 259 (Pa. Super. 1978); *Dunham v. Wright*, 423 F.2d 940 (3rd Cir. 1970). 40 PA. CONS. STAT. §1301.103 (1982) added a therapeutic privilege exception to a Pennsylvania malpractice act, but most of this law was struck down in *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980), as an unconstitutional infringement on the right to a jury trial. The therapeutic exception was untouched by this, but was to be used for the purpose of the gutted act and has not been invoked by any court as grounds for finding a general therapeutic exception in Pennsylvania law.

Id. The court concluded that the privilege to withhold disclosure should operate only when the physician reasonably foresees that the patient's reaction will be "menacing." *Id.*

Indeed, a number of states which employ or have elements of the "patient autonomy" approach have failed to recognize a "therapeutic exception." Pennsylvania is among them. (The others are Connecticut, Florida, Kentucky, Nevada, New Mexico, Ohio, and Rhode Island.) *See* Meisel & Kabnick, *Informed Consent to Medical Treatment: An Analysis of Recent Legislation*, 41 U. PITT L. REV. 407, 457 (1980); *Dunham v. Wright*, 423 F.2d 940, 944-45 (3rd Cir. 1970) (construing Pennsylvania law); *Logan v. Greenwich Hospital Assoc.*, 465 A.2d 294 (Conn. 1983) (therapeutic privilege mentioned but not passed upon); *Henning v. Parsons*, 95 N.M. 454, 623 P.2d 574 (1981) (no mention of therapeutic privilege); *Congrove v. Holmes*, 37 Ohio Misc. 95, 308 N.E.2d 765 (Comm. Pleas 1973) (No mention of therapeutic privilege); *Beauvais v. Notre Dame Hospital*, 387 A.2d 689 (R.I. 1978) (no mention of therapeutic privilege).

Reluctance of states to reintroduce "physician paternalism" by way of a therapeutic exception is well-founded. "Available evidence indicates that the physician's decisions to withhold information are based on hearsay rather than on actual experience with the effects of full disclosure and that the physician's own emotional reluctance to confront the patient with stark diagnoses and risks often prevents disclosure." Note, *Restructuring Informed Consent*, *supra* p. 25. Professor Simpson of Northwestern University Law School states that the traditional pessimism of courts over the ability of patients to make rational decisions about their medical treatment is based on "myth" and conjecture. Simpson, *Informed Consent: From Disclosure to Patient Participation in Medical Decisionmaking*, 76 N.U.L. REV. 172, 178 (1981). "It appears that the possibility of adverse effects arising from disclosure has been overstated," asserts Simpson.

Studies show that the large majority of patients do not refuse treatment after being informed about "relatively risky medical procedures," that they withstand surgery better than uninformed patients and that, on the average, informed patients "suffer equal or lower levels of anxiety" than patients who are not informed. *Id.* at 180.

In the abortion context, the psychological harm to the patient assertedly associated with disclosure of information about the fetus, *see Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d at 1021; *Planned Parenthood Association of Kansas City, Mo. v. Ashcroft*, 655 F.2d 848, 868 (8th Cir. 1981); *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980), may be experienced far more severely after the procedure has been irrevocably performed if the patient later learns about the information withheld from her. Common sense suggests that the very women who are most likely to be upset by disclosures before the abortion, and thus those most likely to be candidates for the therapeutic exception, are the ones most likely to experience psychological complications after the abortion upon learning the information withheld. Furthermore, they are precisely the women whose choice would most likely be different if fully informed, and thus those most likely to be deprived of a truly autonomous choice by the paternalistic decision not to disclose.

In the present context, it is impossible to see how information on medical assistance benefits, paternal support, or the existence of abortion alternatives could possibly warrant invocation of a therapeutic exception, even if such an exception generally existed in Pennsylvania law. Since the information on fetal development, which is only provided to the woman *if she requests it*, must be "scientifically accurate" and "nonjudgmental" under section 3208, it cannot be assumed as a matter of law that the printed information will be of a nature that will "foreclose rational decision," "hinder treatment," or "pose psychological damage." *Canterbury v. Spence*, 464 F.2d at 785.

Surely it should be within the legislature's discretion to decide whether, in a particular context, the adoption of a therapeutic exception enhances or harms informed consent based on the "patient autonomy" approach. The decision of the Pennsylvania legislature not to include such an exception in the Pennsylvania statute must be regarded as embodying a position grounded in precedent, properly responsive to the particular circumstances of abortion, and supported by respectable opinion in scholarly debate.

CONCLUSION

In *Akron*, this Court held that regulations on the speech that attends abortion must be designed to "inform the woman's consent" rather than "to persuade her to withhold it altogether" in order to escape the charge that such regulations are unjustified and unduly burdensome. *Akron*, 462 U.S. at 444; *cf. Zauderer*, 53 U.S.L.W. at 4594. Under this standard, sections 3205(a)(2) and 3208 should not be declared facially unconstitutional, as the Third Circuit did. Rather, a finder of fact should determine whether these provisions, and the printed materials they incorporate, would provide valuable information to women contemplating abortion or would merely confuse and confound their decisions. It is simply not evident on the face of these provisions that their requirements are unjustified or unduly burdensome, as the Third Circuit held they were. Because this case was decided upon appeal of the District Court's action on a preliminary injunction, there was no full trial on the merits to permit the development of facts necessary to determine whether or not these provisions are unconstitutional in their actual application.

Your *amici* therefore argue that, because these provisions are not facially unconstitutional, this Court should remand to the District Court with instructions to determine whether section 3205(a)(2) and the printed information produced pursuant to section 3208 represent,

in their actual application, unjustified or unduly burdensome impositions on the rights of the women contemplating abortion under the standards of *Akron* and *Zauderer*.

Respectfully submitted,

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APPENDICES

APPENDIX A

18 PA. CONS. STAT. §3205(a)(2) (1983):

§3205. Informed consent

(a) General rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if....

(2) The woman is informed, by the physician or his agent, at least 24 hours before the abortion:

(i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

(iii) That she has the right to review the printed materials described in section 3208 (relating to printed information). The physician or his agent shall orally inform the woman that the materials describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. If the woman is unable to read the materials furnished her, the materials shall be read to her. If the woman seeks answers to questions concerning any of the information or materials, answers shall be provided her in her own language.

18 PA. CONS. STAT. §3208 (1983):

§3208. Printed information

(a) General Rule.—The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, the following easily comprehensible printed materials:

(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner, including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall include the following statement:

"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."

(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full

term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

(b) Format.—The materials shall be printed in a typeface large enough to be clearly legible.

(c) Free distribution.—The materials required under this section shall be available at no cost from the department upon request and in appropriate number to any person, facility or hospital.

APPENDIX B

NOTES TO TABLE OF CURRENT POSITIONS ON THE APPROACH TO INFORMED CONSENT BY STATE

[1]ALABAMA. *Roberts v. Wood*, 206 F. Supp. 579 (S.D. Ala. 1962).

[2]ALASKA. *Poulin v. Zoitman*, 542 P.2d 251 (Alaska 1975); *Patrick v. Sedwick*, 391 P.2d 453 (Alaska 1964); ALASKA STAT. §09.55.556 (Supp. 1983). The common law standard of disclosure is not adequately articulated in these two cases. However, the statute requires that a physician disclose common risks and reasonable alternatives to the proposed treatment. The health care provider may limit the extent of the information disclosed if he reasonably believes that a full disclosure would have an adverse effect on the patient's condition.

[3]ARIZONA. *Shetter v. Rochelle*, 2 Ariz. App. 358, 409 P.2d 74 (Ct. App. 1965). Note, however, that even though Arizona follows a "physician paternalism" rule, the court said that the consenter must understand substantially the nature of the surgical procedure attempted and the probable results of the operation. *See also, Riedisser v. Nelson*, 534 P.2d 1052, 111 Ariz. 542 (1975); *Rodriguez v. Jackson*, 574 P.2d 481, 118 Ariz. 13 (1977); *Hales v. Pittman*, 576 P.2d 493, 118 Ariz. 305 (1978). Under *Hales*, the scope of disclosure required can be expanded by the patient's instructions to the doctor and information may not be withheld if it is relevant to the patient's ability to give his or her informed consent.

[4]ARKANSAS. *Pegram v. Sisco*, 406 F.Supp. 776 (W.D. Ark. 1976); *Fuller v. Starnes*, 597 S.W.2d 88, 268 Ark. 476 (1980); ARK. STAT. §34-2614.

[5]CALIFORNIA. *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1,

104 Cal. Rptr. 505 (1972). California applies the "patient autonomy" approach with respect to any potential of death or serious harm; beyond such risks, disclosure is required according to the "physician paternalism" rule. *See also McKinney v. Nash*, 120 Cal. App. 3d 428, 174 Cal. Rptr. 642 (1981); *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1981). CAL. HEALTH AND SAFETY CODE §1704.5 (1980) requires doctors to inform patients with breast cancer of risks and alternative treatments. CAL. BUSINESS AND PROFESSIONAL CODE §4211.5 provides for patient autonomy in DMSO treatments.

[6]COLORADO. *Mallett v. Pirkey*, 171 Colo. 271, 466 P.2d 466 (1970). Though the rule in Colorado falls under a "physician paternalism" model, the burden rests upon the doctor to prove, if challenged, that his behavior conformed to acceptable standard physician practice. *See also Greenwell v. Gill*, 660 P.2d 1305 (Colo. App. 1982); *Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982) cites the rule in *Mallett* but links the duty to disclose to the level of risk the patient is exposed to. If the doctor knew or should have known that risk would be a significant factor in the patient's decision, he must disclose.

[7]CONNECTICUT. *Logan v. Greenwich Hospital Association*, 465 A.2d 294 (Conn. 1983). Connecticut adopted a patient autonomy rule in this case, without passing upon the therapeutic exception.

[8]DELAWARE. *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); DEL. CODE ANN. tit. 18, §§6851-6852 (Supp. 1984). *See also Robinson v. Mraz*, 433 A.2d 1051 (Del. Super. Ct. 1981). DEL. CODE ANN. tit. 24 §1794 (Rev. 1974) adopts a patient autonomy rule for abortion.

[9]DISTRICT OF COLUMBIA. *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). *See also Crain v. Allison*, 443 A.2d 558 (D.C. App. 1982); *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983).

[10]FLORIDA. *Ditlow v. Kaplan*, 181 So. 2d 226 (Fla. Dist. Ct. App. 1965); *Bowers v. Talmadge*, 159 So. 2d 888 (Fla. Dist. Ct. App. 1964); FLA. STAT. ANN. §768.45 (West Supp. 1985). Under the Florida statute, a physician may disclose information in accordance with accepted medical practice, but that degree of disclosure must be sufficient to permit a reasonable individual to have a general understanding of the procedure, acceptable alternative treatments, and any substantial risks and hazards recognized as inherent in the procedure. *Accord Bowers v. Talmadge*, but *Ditlow v. Kaplan* holds that a doctor who advises a patient that a procedure is serious and "risky" should be discharged unless the plaintiff presents expert testimony that it is the custom to volunteer more detailed information. *See also Ritz v. Florida Patient's Compensation Fund*, 436 So. 2d 987 (Fla. Dist. Ct. App. 1983); *Thomas v. Berrios*, 348 So. 2d 905 (Fla. Dist. Ct. App. 1977).

[11]GEORGIA. *Young v. Yarn*, 136 Ga. App. 737, 222 S.E.2d 113 (Ct. App. 1975); GA. CODE ANN. §§88-2901 to -2907 (1981); not applicable to abortion and sterilization. *See also Padgett v. Ferrier*, 323 S.E. 2d 166 (Ga. App. 1984); *Hyles v. Cockrill*, 312 S.E.2d 124, 169 Ga. App. 132 (1983); *Charles v. State*, 307 S.E.2d 701, 167 Ga. App. 803 (1983).

[12]HAWAII. *Nishi v. Hartwell*, 52 Hawaii 188, 473 P.2d 116 (1970); HAWAII REV. STAT. §§671-3 (1976). The statute fails to specify the standard by which the adequacy of the physician's disclosure is to be measured. The statute empowers the state board of medical examiners to establish these standards. *Nishi* appears to apply a "physician paternalism" standard. Nevertheless, there is language in the opinion which suggests that the court is adhering to a "full-disclosure" patient-autonomy rule with the therapeutic exception.

[13]IDAHO. *LePlelly v. Grefenson*, 101 Idaho 422, 614 P.2d 762 (1980); IDAHO CODE §18-609 (Supp. 1984), §§39-4301 to -4306 (1977). Under *LePlelly*, though the "physician paternalism" rule is adopted, the court held that when relatively complicated surgery is involved a physician

must disclose known risks of death or serious bodily injury. Although §§39-4301 to -4306 adopt a "physician paternalism" approach, they do not apply to abortion procedures. A "patient autonomy" approach to abortion is provided in §18-609.

[14]ILLINOIS. *Green v. Hussey*, 127 Ill. App. 2d 174, 263 N.E.2d 156 (App. Ct. 1970); ILL. REV.STAT. ch. 38, §81-23.2 (1981). Though *Green* adopts the "physician paternalism" rule, Illinois statutory law adopts the "patient autonomy" approach for abortion procedures. *See also Magana v. Elie*, 439 N.E.2d 1319, 108 Ill. App. 3d 1028, 64 Ill. Dec. 511 (1982); *Guebard v. Jabaay*, 452 N.E.2d 751, 117 Ill. App. 3d 1, 72 Ill. Dec. 498. (1983).

[15]INDIANA. *Joy v. Chau*, 377 N.E.2d 670 (Ind. Ct. App. 1978). The *Joy* court held that a physician is to make a reasonable disclosure to his patient, but failed to adopt either of the two rules. *See also Revord v. Russell*, 401 N.E.2d 763 (Ind. App. 1980); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. App. 1981).

[16]IOWA. *Grosjean v. Spencer*, 258 Iowa 685, 140 N.W.2d 139 (1966); IOWA CODE ANN. §147.137 (West Supp. 1982-83). Prior to the adoption of the statute, Iowa followed the "physician paternalism" rule. Though the statute cannot be classified as following either of the two rules, it does require the physician to disclose the nature and purpose of the proposed treatment and the known risks if they are included in a specified list of serious dangers. *See also Cowman v. Hornaday*, 329 N.W.2d 422 (Iowa 1983). The court held the "professional rule" inapplicable in this case and applied the "patient rule." *Cowman* involved elective surgery—"a vasectomy for socioeconomic reasons."

[17]KANSAS. *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960); *Lindquist v. Ayerst Laboratories, Inc.*, 607 P.2d 1339, 227 Kan. 308 (1980).

[18]KENTUCKY. *Holton v. Pfingst*, 534 S.W.2d 786 (Ky. 1975); *Bennett v. Graves*, 557 S.W.2d 893 (Ky. Ct. App.

1977); KY. REV. STAT. ANN. §§304.40-320 (Baldwin 1981). *Bennett* and *Holton* adopt the "physician paternalism" rule. However, the statutory provisions adopted after *Holton* require that information be provided to the patient such that "a reasonable individual...would have a general understanding of the procedure and...acceptable alternative procedures...and substantial risks and hazards inherent in the proposed treatment...." *See also* KY. REV. STAT. §§311.726, 311.729 (1983) (informed consent statute for abortion requiring physician to divulge information on risks, fetal development, and alternatives.)

[19]LOUISIANA. *Percle v. St. Paul Fire and Marine Ins. Co.*, 349 So. 2d 1289 (La. Ct. App. 1977); LA. REV. STAT. ANN. §40:1299.40 (West 1977). *See also LaCaze v. Collier*, 434 So. 2d 1039 (La. 1983), which applies the patient autonomy standard of LA. REV. STAT. ANN. §40:1299.40 (West 1977). A measure of patient autonomy applies to abortion as well under LA. REV. STAT. §40:1299.35.6 (1977).

[20]MAINE. *Woolley v. Henderson*, 418 A.2d 1123 (Me. 1980); ME. REV. STAT. ANN. tit. 24, §2905 (Supp. 1984-1985). Maine has an informed consent statute for abortion requiring the physician to inform the patient of the nature of the procedure, gestational age, risks, and alternatives. ME. REV. STAT. ANN. tit. 22 §1599 (1984-1985).

[21]MARYLAND. *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (Ct. App. 1977).

[22]MASSACHUSETTS. *Schroeder v. Lawrence*, 372 Mass. 1, 359 N.E.2d 1301 (1977); *Haggerty v. McCarthy*, 344 Mass. 136, 181 N.E.2d 562 (1962); *Harnish v. Children's Hospital Medical Center*, 439 N.E.2d 240, 387 Mass. 152 (1982); *Halley v. Birbiglia*, 458 N.E.2d 710, 390 Mass. 540 (1983). Under *Halley*, the physician must divulge information sufficient to enable a patient to make an informed judgment about whether to give or withhold consent. *Harnish* appears to commend *Canterbury* but balances the patient's right to know with the burden to

disclose on the doctor. MASS. ANN. LAWS ch. 112 §§12Q, 12S (Michie/Law. Coop. 1985) require the physician to inform the patient of risks of and alternatives to abortion.

[23]MICHIGAN. *Roberts v. Young*, 369 Mich. 133, 119 N.W. 2d 627 (1963); *Marchlewicz v. Stanton*, 213 N.W.2d 317, 50 Mich. App. 344 (1973).

[24]MINNESOTA. *Plutshack v. University of Minn. Hospitals*, 316 N.W.2d 1 (Minn. 1982); *Cornfeldt v. Tongren*, 262 N.W. 2d 684 (Minn. 1977); MINN. STAT. ANN. §144.651 (West Supp. 1982). *See also Reinhardt v. Colton*, 337 N.W.2d 88 (Minn. 1983).

[25]MISSISSIPPI. *Ross v. Hodges*, 234 So. 2d 905 (Miss. 1970).

[26]MISSOURI. *Aiken v. Carey*, 396 S.W.2d 668 (Mo. 1965); *Eichelberger v. Barnes Hospital*, 655 S.W.2d 699 (Mo. App. 1983); *Kinser v. Elkadi*, 674 S.W.2d 226 (Mo. App. 1984). Missouri has undertaken to safeguard patient autonomy and "truly informed consent" where abortion is involved. MO. ANN. STAT. §188.039 (Vernon) requires physician disclosure of risks, gestational age of fetus, and alternatives to abortion.

[27]MONTANA. *Negaard v. Estate of Feda*, 152 Mont. 47, 446 P.2d 436 (1968); *Llera v. Wisner*, 557 P.2d 805 (Mont. 1976); *Collins v. Itoh*, 503 P.2d 36 (Mont. 1972). MONT. CODE ANN. 50-20-104, 50-20-106 provides an exception for abortion to Montana's physician paternalism rule. Doctors must provide information on abortion procedures, consequences, and alternatives.

[28]NEBRASKA. No case law. NEB. REV. STAT. §44-2816 (1978).

[29]NEVADA. *Corn v. French*, 71 Nev. 289, 280 P.2d 173 (1955); NEV. REV. STAT. §41A.110.120 (1981). Under the Nevada statute, neither the "physician paternalism" nor "patient autonomy" rule is adopted. Instead the statute delineates information that must be provided for patient

consent. This includes the general nature of the procedure to be undertaken, its risks, and any alternative treatments feasible. To that extent, the statute follows the "patient autonomy" rule.

[30]NEW HAMPSHIRE. *Folger v. Corbett*, 118 N.H. 737, 394 A.2d 63 (1978); N.H. REV. STAT. ANN. §507-C (Supp. 1981). Declared void by the Supreme Court of New Hampshire in *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

[31]NEW JERSEY. *Kaplan v. Haines*, 96 N.J. Super. 242, 232 A.2d 840 (1967), *aff'd* 51 N.J. 404, 241 A.2d 235 (1968); *Calabrese v. Trenton State College*, 392 A.2d 600, 162 N.J. Super. 145 (1978).

[32]NEW MEXICO. *Henning v. Parsons*, 95 N.M. 454, 623 P.2d 574 (1980).

[33]NEW YORK. *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (App. Div. 1977); N.Y. PUBLIC HEALTH LAW §2805-d (Consol. Supp. 1984). *See also Nisenholtz v. Mount Sinai Hospital*, 483 N.Y.S.2d 568 (N.Y. Sup. Ct. 1984); *Bellier v. Bazan*, 478 N.Y.S.2d 562 (N.Y. Sup. Ct. 1984). Applying §2805-d, the *Nisenholtz* court held the physician must disclose information that would "enable a reasonably prudent patient to make a knowledgeable evaluation of whether to submit to" a procedure.

[34]NORTH CAROLINA. *Butler v. Berkeley*, 25 N.C. App. 325, 213 S.E.2d 571 (Ct. App. 1975); N.C. GEN. STAT. §90-21.13 (1981). Under the statute, a disclosure consistent with general medical practice is sufficient only if such disclosure gives the patient a general understanding of the treatment and its recognized risks. *See also Azzolino v. Dingfelder*, 322 S.E.2d 567 (N.C. App. 1984); *Brigham v. Hicks*, 260 S.E.2d 435 (N.C. App. 1979); *Nelson v. Patrick*, 326 S.E.2d 45 (N.C. App. 1985).

[35]NORTH DAKOTA. *Walker v. North Dakota Eye Clinic*, 415 F. Supp. 891 (D.N.D. 1976); N.D. CENT. CODE

§26-40.1-04 to -05 (1978). Statute declared unconstitutional in *Arneson v. Olsen*, 270 N.W.2d 125 (N.D. 1978) and repealed 1983. *Lemke v. United States*, 557 F.Supp. 1205 (D.N.D. 1983); *Winkjer v. Herr*, 277 N.W. 2d 579 (N.D. 1979). Prior to *Lemke* and *Winkjer*, North Dakota adhered to a physician paternalism standard. However, as the federal court noted in *Lemke*, the North Dakota Supreme Court, while discussing both the patient autonomy and physician paternalism options in *Winkjer*, refused to explicitly adopt either standard.

[36]OHIO. *Congrove v. Holmes*, 37 Ohio Misc. 95, 308 N.E.2d 765 (Comm. Pleas 1973); OHIO REV. CODE ANN. §2317.54 (Baldwin Supp. 1984). *See also Siegel v. Mt. Sinai Hospital of Cleveland*, 403 N.E.2d 202, 62 Ohio App. 2d 12 (1978). There is no therapeutic exception in the relevant Ohio cases.

[37]OKLAHOMA. *Lambert v. Park*, 597 F.2d 236 (10th Cir. 1979). In *Lambert*, the Tenth Circuit adopted the "patient autonomy" rule for Oklahoma. After discussing several reasons for adopting the "patient autonomy" approach, the court said:

> We have chosen between the tests only because the Oklahoma Court has indicated it would do so. The Court need not, however, consider itself so limited. The better practice would be to adopt a rule allowing for the application of whichever test best comports with the theories of the parties and the evidence produced during the trial.

Lambert v. Park, 597 F.2d at 199. *See also Scott v. Bradford*, 606 P.2d 554 (Okla. 1979). The Oklahoma Supreme Court explicitly adopted the patient autonomy standard in the *Scott* case, although it provided for a therapeutic exception.

[38]OREGON. *Holland v. Sisters of St. Joseph of Peace*, 270 Or. 129, 522 P.2d 208 (1974); OR. REV. STAT. §677.097 (1981). *See also Creasy v. Hogan*, 617 P.2d 1377, 289 Or. 733 (1980). *Creasy* applied and supplemented the holding in

Holland, providing a therapeutic exception to the general rule of patient autonomy.

[39]PENNSYLVANIA. *Jeffries v. McCague*, 242 Pa. Super. 76, 363 A.2d 1167 (1976); *Cooper v. Roberts*, 220 Pa. Super. 260, 286 A.2d 647 (1971); PA. STAT. ANN. tit. 40, §1301.103 (Purdon Supp. 1982). *See also Defulvio v. Holst*, 414 A.2d 1087 (Pa. Super. 1979). There is no therapeutic exception in Pennsylvania.

[40]PUERTO RICO. *Torres Perez v. Hospital Doctor Susoni*, 95 P.R.R. 845 (1968).

[41]RHODE ISLAND. *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676 (1972); *Beauvais v. Notre Dame Hospital*, 387 A.2d 689 (R.I. 1978). The cases applying the patient autonomy rule make no mention of the therapeutic exception.

[42]SOUTH CAROLINA. *Hook v. Rothstein*, 316 S.E.2d 690 (S.C. App. 1984).

[43]SOUTH DAKOTA. *Cunningham v. Yankton Clinic*, 262 N.W.2d 508 (S.D. 1978). To date, no standard has been enunciated in South Dakota.

[44]TENNESSEE. *Longmire v. Hoey*, 512 S.W.2d 307 (Tenn. Ct. App. 1974); TENN. CODE ANN. §29-26-118 (Supp. 1984). *See also German v. Nichopoulos*, 577 S.W.2d 197 (Tenn. Ct. App. 1978). Tennessee requires the physician to inform the patient of the risks of and alternatives to abortion as well as the age of the fetus. TENN. CODE ANN. §39-4-202 (1984 Supp.).

[45]TEXAS. *Karp v. Cooley*, 493 F.2d 408 (5th Cir. 1974); TEX. REV. CIV. STAT. ANN. art. 4590, §§6.02-.07 (Vernon Supp. 1982), implemented by 3 Tex. Reg. 4293 (1978). *See also Peterson v. Shields*, 652 S.W.2d 929 (Tex. 1983). Until the medical disclosure panel, created by statute, promulgates standards of disclosure, doctors must disclose information that would influence a reasonable person. *Barclay v. Campbell*, 683 S.W.2d 498 (Tex. Ct. App. 1984)

provides for an exception to this reasonable person rule where disclosure is not medically feasible.

[46]UTAH. *Ficklin v. McFarlane*, 550 P.2d 1295 (Utah 1976); UTAH CODE ANN. §78-14-5 (1977). *See also Reiser v. Lohner*, 641 P.2d 93 (Utah 1982); *Nixdorf v. Hicken*, 612 P.2d 348 (Utah 1980). UTAH CODE ANN. §76-7-305.5 requires informed consent for abortion. The physician must inform the patient of the procedure, risks, alternatives, and physical characteristics of a normal unborn child.

[47]VERMONT. *Small v. Gifford Memorial Hospital*, 133 Vt. 552, 349 A.2d 703 (1975); VT. STAT. ANN. tit. 12, §1909 (Supp. 1981). Under *Small*, the Vermont Supreme Court adopted the "patient autonomy" approach. The statute, however, though prescribing the elements of information that must be disclosed—i.e. the alternatives to the treatment or diagnosis and the risks and benefits involved—incorporates these requirements in a "physician paternalism" approach. *See also Perkins v. Windsor Hospital Corp.*, 455 A.2d 810 (Vt. 1982).

[48]VIRGINIA. *Bly v. Rhoads*, 216 Va. 645, 222 S.E.2d 783 (1976). VA. CODE §18.2-76 (1982) (statute requiring informed consent for abortion).

[49]WASHINGTON. *Miller v. Kennedy*, 11 Wash. App. 272, 522 P.2d 852 (Ct. App. 1974), *aff'd.* 85 Wash. 2d 151, 530 P.2d 334 (1975); WASH. REV. CODE ANN. §§7.70.050-.060 (Pocket Part 1985). *See also Adams v. Richland Clinic, Inc.* 681 P.2d 1305, 37 Wash. App. 650 (1984); *Holt v. Nelson*, 523 P.2d 211, 11 Wash. App. 230 (1974). These cases establish a lay standard of disclosure with a therapeutic exception.

[50]WEST VIRGINA. *Cross v. Trapp*, 294 S.E.2d 446 (W. Va. 1982), adopts a "patient need" standard with a therapeutic exception.

[51]WISCONSIN. *Trogun v. Fruchtman*, 58 Wis.2d 569, 207 N.W.2d 297 (1973); *Scaria v. St. Paul Fire & Marine Insurance Co.*, 227 N.W.2d 647 (Wis. 1975).

[52]WYOMING. *Govin v. Hunter*, 374 P.2d 421 (Wyo. 1962); *Stundon v. Stadnick*, 469 P.2d 16 (Wyo. 1970).

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No. 84-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELLEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. FOR APPELLANTS RICHARD THORNBURGH, ET AL.

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NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL RIGHT TO LIFE COMMITTEE, INC.

The National Right to Life Committee, Inc. is a non-profit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background and political belief. It engages in various political, legislative, legal and educational activities to protect and promote the concept of the sanctity of human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee have supported legislation to protect unborn human life within these guidelines. The Pennsylvania Abortion Control Act is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its affiliate, the Pennsylvania Pro-Life Federation. By means of this brief, the National Right to Life Commitee, Inc. seeks to advance these interests by supporting the Pennsylvania post-viability abortion regulations herein.

BRIEF AMICUS CURIAE NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated .n the Appellants' Brief of Richard Thornburgh, et al.

SUMMARY OF ARGUMENT

The right of a woman to choose to terminate her pregnancy, while constitutionally guaranteed, is not absolute, and does not include the right to ensure that an abortion performed after the point of viability of the fetus results in delivery of a dead fetus rather than a live child. In the face of the compelling state interest in protecting unborn viable human life recognized in *Roe v. Wade*, 410 U.S. 113 (1973), regulation of abortion practices such as that enacted in 18 PA. CONS. STAT. §3210(b) is justified.

Section 3210(b) mandates, in the post-viability abortion context, that the attending physician use the abortion procedure most likely to result in a live birth unless that procedure entails a significantly greater risk to the life or health of the pregnant woman. In assessing the medical risk, the physician may not consider the psychological or emotional effect on the woman if her child is delivered alive rather than dead. It is a reasonable exercise of Pennsylvania's power, pursuant to its compelling interest in viable unborn life, to require at least a significant increase in the risk to maternal life or health before allowing the life of the viable fetus to be terminated.

Pennsylvania's exclusion from the physician's consideration of the psychological or emotional impact of live birth in assessing medical risk is justified by principles previously articulated by this Court concerning the definition of maternal "health" in the abortion decision context. The broad definition of maternal health set forth in *Doe v. Bolton*, 410 U.S. 179 (1973), has only been applied by this Court to first-trimester abortion situations. This Court made it clear in *Roe v. Wade* and its progeny that the maternal health considerations during the first trimester of pregnancy, which justify abortions for a broad range of reasons, are not the same as those at the point of viability. To reason otherwise would negate the state's compelling interest in potential life recognized by this Court at viability. The employment of the phrase "significantly greater medical risk" in Section 3210(b) is an appropriate

way for Pennsylvania to differentiate between the broad definition of maternal health in the first trimester and the markedly different and more grave nature of the post-viability health exception.

ARGUMENT

I

IN REGULATING THE ABORTION OF A VIABLE FETUS, THE STATE MAY REQUIRE THAT THE PHYSICIAN EXCLUDE FROM CONSIDERATION INSIGNIFICANT PHYSICAL HEALTH RISKS TO THE WOMAN AND MATERNAL FEAR OF A LIVE BIRTH IN SELECTING THE METHOD OF ABORTION.

This *amicus curiae* brief will address the sole issue of whether the Court of Appeals for the Third Circuit erred in its determination that 18 PA. CONS. STAT. ANN. §3210(b) (hereinafter "Section 3210(b)") is unconstitutional under the precedents of this Court. *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 737 F.2d 283, 300 (1984). In its entirety, Section 3210(b) provides as follows:

> Degree of care. — Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive *unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique* and the physician reports the basis for this judgment. *The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother.* Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree (emphasis added).

Addressing itself to the constitutionality of Section 3210(b), the court below cited *Colautti v. Franklin*, 439 U.S. 379 (1979), and asserted that in it this "Court held that the earlier Pennsylvania statute impermissibly required the doctor to make a 'trade-off' between the woman's health and . . . fetal survival." *Thornburgh*, 737 F.2d at 300, citing *Colautti*, 439 U.S. at 400. Arguing that the "new Pennsylvania statute, like the old, fails to require that maternal health be the paramount consideration," the court below focused on the legislature's use of the word "significantly" and found that the challenged statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus, and therefore . . . (is) unconstitutional." *Thornburgh*, 737 F.2d at 300.

A. The Woman's Right of Privacy Does Not Include the Right to Ensure the Destruction of a Viable Fetus

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that the right of personal privacy included the right of a pregnant woman to decide whether or not to have an abortion. Therefore, this Court invalidated a Texas statute which prohibited all abortions except those procured for the purpose of saving the life of a mother. 410 U.S. at 164. In the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), this Court, among other things, struck down Georgia's abortion statute which required that the abortion must be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. 410 U.S. at 194. After noting that such a requirement is not imposed on the performance

of nonabortion surgery, *id.* at 193, the Court found that it violated the equal protection of laws because it was not "based on differences that are reasonably related to the purposes of the act in which it is found." *Id.* at 194.

However, in establishing that there are compelling state interests in potential life and maternal health which allow the state to regulate abortion, this Court has emphatically declared that, while there is a constitutionally protected interest in making certain kinds of important decisions "free from governmental compulsion," *Whalen v. Roe*, 429 U.S. 589 (1977), these protected rights are "not absolute." *Carey v. Population Services International*, 431 U.S. 678 (1977). "As *Whalen* makes clear, the right in *Roe v. Wade*, *supra*, can be understood only by considering both the woman's interest and the nature of the state's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion....' Rather, the right protects the woman from unduly burdensome interferences with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). In addition, "not all distinction between abortion and other procedures is forbidden." *Bellotti v. Baird I*, 428 U.S. 132, 145 (1976). The constitutionality of such distinction will depend upon the degree and the justification for it. *Id.* Abortion, unlike other medical procedures, involves the termination of potential human life. *Maher v. Roe*, 432 U.S. at 480.

The woman's right recognized in *Roe* was the right to an abortion in the sense of a right to empty the womb of the unwanted fetus and not in the sense of a right to ensure that the fetus will die in the process. Professor Rhoden has recognized this vital distinction. She observes, "Writers on abortion have generally assumed, reasonably enough, that removing the fetus from the womb ('womb-emptying') would necessarily result in its destruction ('feticide'). In the live birth situation, however, womb-emptying and feticide have diverged; removing the fetus has unexpectedly failed to destroy it." Rhoden, *The New Neonatal Dilemma: Live*

Births From Late Abortions, 72 GEORGETOWN LAW J. 1451, 1453 (1984) (footnote omitted). The same point is made by Laurence Tribe. "Once the fetus can be severed from the womb by a process which enables it to survive," wrote Professor Tribe, "leaving the abortion decision to private choice would confer not only a right to remove an unwanted fetus from one's body but also an entirely separate right to ensure its death. Apart from the problematic nature of any claim in behalf of the latter right, its recognition and enforcement would be indistinguishable from recognizing and enforcing a right to commit infanticide...." Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARVARD LAW REV. 1, 27 (1973) (footnote omitted).

No court has held that the abortion privacy right is a right to commit feticide. On the contrary, such a notion has been specifically rejected. In *Wynn v. Scott*, a state statute was under consideration which mandated, in the court's construction, that "[i]f...there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure that is least likely to kill the fetus." 449 F.Supp. 1302, 1321 (1978), *aff'd. sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979). "This choice," Prentice Marshall wrote for a unanimous court, "would not interfere with the woman's right to terminate her pregnancy. *It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.*" *Id.* (emphasis added).

B. The State's Interest in Protecting the Life of a Viable Fetus is Compelling

This Court has found that the State has a legitimate interest in potential life. This interest "grows in substantiality as the woman approaches term and, at a point during pregnancy ... becomes compelling." *Roe v. Wade*, 410 U.S. at 163. "At viability, usually in the third trimester, the state's interest in potential life of the fetus justifies

prohibition with criminal penalties, except where the life or health of the mother is threatened." *Maher v. Roe*, 432 U.S. at 472.

At viability, the unborn child can live independently outside the mother's womb. Thus, this Court has recognized that the state interest in protecting the unborn child, at viability, becomes dominant and the state may go so far as to proscribe the abortion procedure. *Roe v. Wade*, 410 U.S. at 155. As stated by this Court in *Roe v. Wade*, "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo, and later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Roe v. Wade*, 410 U.S. at 159 (citation omitted).

C. The State's Compelling Interest in Protecting the Viable Fetus Supports the Requirements of Section 3210(b)

Section 3210(b) mandates, in the post-viability abortion context, that the attending physician use the abortion procedure most likely to result in a live birth unless that procedure entails a significantly greater medical risk to the life or health of the pregnant woman. In assessing the medical risk, the physician may not consider the psychological or emotional effect on the woman if her child

is delivered alive rather than dead.[1]

Section 3210(b) is not unconstitutional in light of *Roe v. Wade*. Pennsylvania's interest in protecting viable unborn life is compelling. It is a reasonable exercise of the state's power pursuant to that interest to require at least a *significant* increase in the risk to maternal life or health before allowing the life of the viable fetus to be terminated. Significant means "having meaning." WEBSTER'S NEW COLLEGIATE DICTIONARY 1071 (1981). Its antonym is "unimportant." ROGET'S COLLEGE THESAURUS 326 (1962). Thus, the State of Pennsylvania rejects only an "unimportant" or meaningless increase in the health risk to a woman as a basis for nullifying its compelling interest in the life of a fetus with a reasonable likelihood of survival.

After viability, the unborn child could survive outside the mother's womb and the state has a compelling interest in protecting that potential life. If the "compelling interest" has any meaning, it must support a requirement increasing the likelihood of fetal survival when there is only an insignificant and unimportant increase in the health risk to the mother. Some post-viability abortion methods virtually always result in fetal death while the live birth rate for other methods may vary by five to forty times. Grimes, *Second-Trimester Abortions in the United States*, 16 FAM. PLAN. PERSPECT. 260, 264 (1984); Grimes and Cates, *The Comparative Efficacy and Safety of Intraamniotic Prostaglandin F2a and Hypertonic Saline for Second-Trimester Abortion*, 22 J. REPRO. MED. 248, 252 (1979). In contrast, the risk of mortality to the woman varies from

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[1] Section 3210(b) could reasonably be construed to mandate only that the physician may not base his decision to use an abortion procedure other than the procedure most likely to result in a live birth *solely* on the possibility of psychological or emotional harm to the woman if her child is delivered alive rather than dead. Such a construction would avoid the claim that the section imposes increased medical risks on the woman. For the purpose of this brief, however, the construction adopted by the Third Circuit is used.

12.0/100,000 to 14.2/100,000 for some of the most common post-viability abortion methods. *Second-Trimester Abortions*, *supra*, at 263. There is, therefore, a tremendous increase in the likelihood of fetal survival by use of certain abortion methods rather than others while the risks to the mother vary only thousandths of a percent.

The state's interest in post-viability unborn life is not theoretical. In 1981, for instance, there were 13,790 abortions after 21 weeks of pregnancy and 49,600 between 16 and 20 weeks. Henshaw, *A Portrait of American Women Who Obtain Abortions*, 17 FAM. PLAN. PERSPECT. 90, 92 (1985). In addition, the neonatal survival rates are steadily pushing the age of viability well into the second trimester. *See* Appendix A. Recently, a modification of a pre-existing abortion method has been developed purposely to ensure fetal death and is being used even though it increases the risk to the health of the mother. *See* Haning & Peckham, *Evaluation of Intra-Amniotic Administration of 120 gm of Urea with 5 mg of Prostaglandin F2α for Midtrimester Termination of Pregnancy Between 20 and 24 Weeks Gestation*, 151 AM. J. OB. GYN. 92 (1985); Binkin, et al., *Urea-prostaglandin Versus Hypertonic Saline for Instillation Abortion*, 146 AM. J. OB. GYN. 947, 951 (1983). There are, therefore, a substantial number of viable unborn children whose lives are at stake and whom the state has a compelling interest to protect.

If the state may not protect viable unborn life in the face of an insignificant and unimportant increase in the health risk to the woman, its so-called "compelling" interest in post-viable fetal life is in practice devoid of force and meaning. This view cannot be squared with this Court's careful search for a compelling interest in *Roe* which would have supported a severe criminal sanction for any abortion not performed to protect the life of the pregnant woman. *Roe v. Wade*, 410 U.S. at 156-164. If such a compelling interest could have been found by this Court in the first trimester, the Texas statute making abortion a criminal offense

would have been upheld. *Maher v. Roe*, 432 U.S. at 472. The existence of such a compelling interest after viability is sufficient to protect the life of the fetus when there is only a meaningless increase in risk to the woman's health.

In addition, Section 3210(b) provides that, in assessing the significance of the increase in the risk to the life or health of the pregnant woman, the physician may not consider any alleged psychological or emotional harm to the woman if her child is delivered alive rather than dead. As outlined above, *Roe* does not recognize a constitutional privacy right to commit feticide. Rather, the pregnant woman has a privacy right to terminate her pregnancy in the post-viability period by emptying her womb. Fear of a live birth, if considered sufficient to allow abortion procedures which result only in fetal death, would have the effect of radically altering the *Roe* right and thereby vitiating the state's compelling interest in unborn life.

Roe gave the woman the right to terminate her pregnancy, not to kill her child. Indeed, *Roe* gave the states the right to protect the lives of unborn children beginning at the very time when live births are possible. It is thus appropriate that the Commonwealth of Pennsylvania exclude fear of live births as a factor in seeking to favor live births.

II

ROE V. WADE DOES NOT REQUIRE THE STATES TO ALLOW POST-VIABILITY ABORTIONS UNDER THE BROAD DEFINITION OF HEALTH FOUND IN *DOE V. BOLTON*.

In selecting the procedures most likely to result in the live birth of a post-viable fetus, Section 3210(b) excludes consideration of "the potential psychological or emotional impact on the mother of the unborn child's survival." Thus, in the exercise of its compelling interest in preserving viable fetal life, Pennsylvania has excluded consideration

of the fear of a live birth in the assessment of the "medical risk to the life or health of the pregnant woman."

In recognizing a compelling interest in fetal life, this Court provided that a state may prohibit abortion after viability except when an abortion "is necessary to preserve the life or health of the mother." *Roe v. Wade*, 410 U.S. at 164. In *Doe v. Bolton*, this Court defined health to include factors that are "physical, emotional, psychological, familial, [as well as] the woman's age." 410 U.S. at 192. The court below, however, in a fundamentally erroneous manner, held that this broad definition of health applied after viability and thus required the state to allow abortion for any of these factors. *Thornburgh*, 737 F.2d at 299. The court claimed that "the Pennsylvania legislature was hostile to this definition" in its adoption of the limiting definition in Section 3210(b). *Id.* The court below relied "with confidence on the Supreme Court of Pennsylvania to construe 'health' as does the Supreme Court of the United States [in *Doe v. Bolton*]." *Id.*

A. The *Doe v. Bolton* Definition of Health Applies Only in Early Pregnancy

In *Doe v. Bolton*, appellants argued that the Georgia statute, as it had been left in the wake of the District Court's decision in the case, was unconstitutionally vague. Their argument was that, even though the specific legal justifications for abortion in the Georgia statute had been stricken by the District Court, the state law still made it a crime for a physician to perform an abortion except when it was "based upon his best clinical judgment that an abortion is necessary." 410 U.S. at 191. The appellants contended that the word "necessary" did not warn the physician of the conduct proscribed, that the statute lacked objective standards and was susceptible of several constructions, and that the conduct of doctors would be arbitrary because they would err on the side of caution. *Id.*

This Court upheld the determination of the District

Court in *Doe v. Bolton* in light of its precedent in *United States v. Vuitch*, 402 U.S. 62 (1971). In *Vuitch*, the vagueness issue was raised in relation to a District of Columbia statute that made abortions criminal unless they "were done as necessary for the preservation of the mother's life or health." Since that statute had been construed to bear upon psychological as well as physical well-being, the Court concluded that the term "health" presented no problem of vagueness. 402 U.S. at 72. This conclusion from *Vuitch*, according to the *Bolton* court, was equally applicable to the Georgia statute. 410 U.S. at 192. Continued the Court:

> We agree with the District Court that the medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Id.

The *Bolton* court did not address the issue of whether the same liberal definition of health would apply in the context of abortions done throughout pregnancy. Indeed it did not need to do so, because plaintiff Mary Doe was denied abortion under the Georgia law at issue when she was eight weeks pregnant, or well within her first trimester of pregnancy. *Id.*, at 185-186. Thus, the *Bolton* definition of health applied only to early or first trimester abortions and it is far too expansive a reading of the definition to apply it to post-viability abortions, when the state has a compelling interest in the protection of fetal life.

B. When Analyzed in Tandem with *Roe v. Wade*, the *Doe v. Bolton* Definition of Health Does Not Apply to Post-Viability Abortion

Doe v. Bolton should not, indeed must not, be read in isolation. As Justice Blackmun wrote for the Court in *Roe v. Wade*, "[t]hat opinion and this one, of course, are to be read together." 410 U.S. at 165. When read in tandem with *Roe v. Wade*, it is abundantly clear that the *Bolton* definition of health does not apply in the context of post-viability abortions.

The Court in *Roe v. Wade* explicitly rejected the notion that the woman's right to privacy with respect to her decision on whether to terminate her pregnancy is unlimited. "[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree." 410 U.S. at 153. Instead, the privacy right of the woman "must be considered against important state interests in regulation." *Id.* at 154. Thus, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.* "At some point in pregnancy," continued the Court, "these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* "With respect to the State's important and legitimate interest in the health of the mother," noted the Court, "the compelling point, in light of present medical knowledge, is at approximately the end of the first trimester." *Id.* at 163. And "with respect to the State's important and legitimate interest in potential life, the 'compelling' point is viability." *Id.*

In a passage of *Roe* that emphasizes the point that at no time in pregnancy is the woman's abortion privacy right absolute or completely personal in nature, the Court noted that, during the first trimester of pregnancy, "*the attending physician, in consultation with his patient*, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated (emphasis added)." *Id.* at 163. Thus, it is clear that in all three stages of the abortion regulatory framework announced in *Roe*, health considerations, in some fashion, are important.

But this emphatically is not to say that the health considerations recognized by the Court in *Roe v. Wade* are the same, or that they must be given equal constitutional weight, throughout the full nine month term of pregnancy. In the first trimester, the abortion decision "must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. In describing the factors which could be considered legitimately in exercising this "medical judgment," the Court noted:

> Specific and direct *harm medically diagnosable* even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a *distressful life and future. Psychological harm* may be imminent. *Mental and physical health may be taxed* by child care. There is also the *distress*, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already *unable, psychologically* and otherwise, to care for it. In other cases as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153 (emphasis added).

Thus, under this broad definition of health, very few abortions are performed for any medical reason. Of the women seeking abortion, only 4.5% of those seeking second trimester abortions and 10% of those seeking first trimester abortions claimed any medical indications. Most seek abortion for social and economic reasons. *See* Appendix B.

Despite the fact that few women have any clinical grounds for abortion, those who perform abortions are willing to find medical indications simply because the pregnancy is early or the patient wants one.[2] Other physicians feel that there is a medical indication to abortion in pregnancy if the woman says, "I can't cope with this pregnancy." Zbaraz, *Abortion and the Supreme Court: A Physician's Fight for Medical Equality*, 4 SEXUAL MED. TODAY 43 (1980). In fact, no more than 2 percent of induced abortions are performed "for clinically identifiable reasons," and no more than 1 percent are performed to save the life of the mother — or for any other purpose related to physical health. *1 Constitutional Amendments Relating to Abortion, 1981: Hearings on Bills Proposing a Constitutional Amendment With Respect to Abortion Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 158-59 (1981) (testimony of Irwin M. Cushner).

This situation is exacerbated by the fact that it is usually not a physician who is sought out for advice when pregnancy is suspected. Indeed, in one survey, less than 18% sought the advice of any physician when deciding

[2] *See* Testimony of Dr. Hodgson in *McRae v. Califano*, No. 76-C-1804 (E.D.N.Y.), Transcript, August 3, 1977, at pp. 99-101):

A. In my medical judgment every (pregnancy) that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.

In good faith, I would recommend on a medical basis, you understand, that, and it would be 100% ... I think they are all medically necessary ...

Occasionally we will advise these women to carry their pregnancy to term. But most of these are medically necessary because I am considering the women's physical, mental, emotional and social and welfare and family and environment and all that ... I am concerned with the quality of life not physical existence ... If the words medically necessary came in I think I could live with it. If I could interpret it in my own way, however.

Q. It would be a good faith interpretation?

A. I could live with it.

whether or not to have an abortion and over 87% reported that the physician had absolutely no influence on their decision. Rosen, *The Patient's View of the Role of the Primary Care Physician in Abortion*, 67 AM. J. PUB. HEALTH 863 (1977). Part of the reason for the low influence rate of physicians is the fact that in abortion clinics the physician generally does not even see the patient until she is on the operating table, prepared for the abortion. Hausknecht, *Free Standing Abortion Clinics: A New Phenomenon*, 49 BULL. N.Y. ACADEMY OF MED. 985 (1973). The physician does not even diagnose the woman's condition before the procedure.

In the second trimester under the *Roe v. Wade* standard, the State's compelling interest in the health of the mother justifies regulations that "are reasonably related to maternal health." 410 U.S. at 164. But the Court suggested that such regulations must be narrowly confined to such matters as qualifications and licensing of medical personnel and facilities involved in the performing of abortions. *Id.* at 163. And, in the third (post-viability) stage, the state's compelling interest in protecting "the potentiality of human life" constitutionally justifies the state in prohibiting abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164, 165.

Thus, the *Roe v. Wade* model focuses on different "health" considerations in each of its three stages. The distinctions between these differing "health" concerns associated with the three stages of the *Roe v. Wade* model must be accorded special importance because they are of constitutional significance. The mandatory "life or health" exception, which must be applied by the states to allow legal abortions even after the fetus has reached the time of viability and the state has acquired a compelling reason to proscribe abortions, must not be confused with the "health" condition which may justify a "medical judgment" authorizing abortion in the first trimester.

This proposition finds further support in the climactic conclusion about the Texas abortion statute that this Court drew in *Roe v. Wade:*

> Measured against these standards, Article 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life or health of the mother," *sweeps too broadly.* The statute *makes no distinction between abortions performed early in pregnancy and those performed later*, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

Id. at 164 (emphasis added).

To apply the first trimester "health" definition to the mandatory health exception in the post-viability context also would "sweep too broadly" and would make "no distinction between abortions performed early in pregnancy and those performed later." *Id.* Morever, as this Court noted in *Roe v. Wade*, "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications. If the state is interested in protecting fetal life, *it may go so far as to proscribe abortion* during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-164 (emphasis added). Thus, it is not logical to conclude, as the Third Circuit below did, that this Court would have recognized a state's constitutional power to prohibit post-viability abortions on the one hand only to take it away by means of a broad, all-encompassing "health" exception on the other. As a perceptive analysis of this aspect of the *Roe v. Wade* decision by Professor Wardle has suggested:

> The analytical soundness of reading *Roe* and *Doe* as requiring a post-viability "life or health" exception with an expansive interpretation of "health" is highly questionable. A broad interpretation of this exception would be inconsistent with the deliberate balancing of

> interests that is at the heart of the *Roe* analysis, and would disregard the fundamental distinctions between the "health" concepts associated with the three stages of the *Roe* model. The "health" conditions which constitutionally justify . . . [broad, unregulated access to] abortion during the first trimester are unquestionably much broader than the "health" conditions which constitute the mandatory post-viability "life or health" exception. The fact that *Roe* acknowledged that a "compelling" state interest is thwarted when the post-viability exception is applied mandates a conservative interpretation of this exception. Also, the reason for the imposition, as a constitutional requirement, of the mandatory "life or health" exception to post-viability abortion restrictions has never been stated by the Court, and this, certainly, suggests that it was not intended to be a major exception.
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> Moreover, if the post-viability "life or health" exception were read in terms of the *Doe* or *Roe* description of the first trimester "health" considerations . . . it would create a classic "Catch-22" situation. . . . It would mean that the Court in *Roe* laboriously created a three-part framework for regulating abortion, emphasized that a woman's right to an abortion is not absolute, declared that after viability the state has a "compelling interest" which generally could justify the prohibition of abortion, and then, *sub silentio*, negated it all with an innocuously-appended exception. In short, an expansive reading of the post-viability "life or health" exception is logically indefensible and is analytically inconsistent with the *Roe* model of abortion regulation.

L. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES 14-15 (1980).

C. The Progeny of *Roe v. Wade* also Demonstrate that the *Doe v. Bolton* Definition of Health Does Not Apply to Post-Viability Abortion

The majority opinion in *Colautti* demonstrates further that the *Doe v. Bolton* health definition does not apply to the mandatory health exception for post-viability abortion prohibitions by the states. "*Roe* stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.... We indicated that *up to the points where important state interests provide compelling justifications for intervention*, 'the abortion decision in all its aspects is inherently, and primarily, a medical decision.' *Roe v. Wade*, 410 U.S. at 166." *Colautti v. Franklin*, 439 U.S. at 387 (emphasis added). Thus, this Court once again drew a clear line between the first trimester regulation-free physician-patient abortion privacy right and a drastically more limited concept of serious physiological health endangerment after the compelling state interest in the protection of fetal life arises after viability.

The Court returns to this point slightly later in *Colautti*. "In these three cases [*Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood of Central Missouri v. Danforth*], then, *this Court has stressed viability*, has declared its determination to be a matter for medical judgment, and has *recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period.*" *Colautti v. Franklin*, 439 U.S. at 388 (emphasis added). "Viability is the critical point." *Id.* at 389.

After *Colautti v. Franklin*, this Court again made implicit reference to the fact that the *Doe v. Bolton* definition of health does not apply to the post-viability period of pregnancy as recognized in *Roe v. Wade*. In Justice Powell's plurality opinion in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), the Court stated that "[m]any

third-trimester abortions in Missouri will be *emergency operations*, as the State permits these later abortions only when they are necessary to preserve the life or health of the woman." *Id.* at 485 (emphasis added). The Court also noted *"those unusual circumstances," id.*, and *"rare situations* where there are *compelling medical reasons* for performing abortions after viability." *Id.* at 484 n. 7. Obviously, if this Court in *Planned Parenthood v. Ashcroft* understood the very broad, nearly unlimited first trimester health standard enunciated in *Doe v. Bolton* to define the mandatory post-viability health exception as well, the Court would not have used the emphasized phrases.

D. This Court Need Not Define the Post-Viability Health Exception In Order to Hold Section 3210(b) Constitutional

If the court below were correct in applying the *Doe v. Bolton* definition of health to the mandatory health exception for post-viability abortions, then that health exception would consume, or negate, Pennsylvania's general rule against post-viability abortions, as justified by its compelling interest in the protection of fetal life. What the court below gives with one hand by upholding Pennsylvania's proscription of post-viability abortions, it takes away with the other hand by misapplying *Doe v. Bolton* so as to rob that prohibition of any force or effect.

In order to reverse the erroneous holding of the court below that Section 3210(b) is unconstitutional, it is not necessary for this Court to define the precise limited parameters of the post-viability health exception. Rather it only is necessary for this Court to determine that the employment of the phrase "significantly greater medical risk" in Section 3210(b) is an appropriate way for Pennsylvania to differentiate between the *Doe v. Bolton* definition of maternal health in the first trimester and the markedly different and more grave nature of the post-viability health exception. That determination will ensure

that the post-viability health exception does not operate to deprive Pennsylvania of the power, pursuant to its compelling interest in the protection of fetal life, to mandate that the physician use an abortion procedure that is most likely to produce a live birth, absent a significantly greater medical risk to the pregnant woman.

CONCLUSION

The Pennsylvania statute requiring a physician to employ a post-viability abortion technique most likely to result in a live birth, unless it also entails a significantly greater medical risk to the pregnant woman, is justified as a reasonable exercise of state power pursuant to the compelling interest in viable unborn life. The exclusion from consideration of the psychological or emotional effect of a live birth in assessing medical risk appropriately limits the definition of post-viability maternal health in accord with this Court's previous decisions. Thus, the Amicus Curiae respectfully urges this Honorable Court to reverse the decision below and declare section 3210(b) constitutional.

Respectfully submitted,

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Appendices

Neonatal Survival Rate (%) By Gestational Age (Weeks)*

Study#	Years of Study	# of Patients	State	22	24	26	28	30	32	34	36
1[c]	1976-1979	1003	Vt/NH		0 11	36 47	62 73	76 92	92 98	98 96	
2[a]	1977-1980	62	NY		36 38	61 76					
3[a]	1977-1980	136	Mass.		28 10	44 60	92				
4[b]	1974-1980	2803	Colo.		11	55	84		93		99
5[a]	1980-1982	185	Wis.		0	37 37	68 85	82 81	91 100	100 100	100 100
6[b]	1982	619	UK	0	16	39 56	58				
7[c]	1979-1981	2061	Ala.		17 9	18 29	53 57	67 86	92 91	99 94	97 99
9[c]	1979-1984	105	Tex.		0	50 28	67 100	88 100	95		

[a] survival = infants discharged from hospital

[b] survival = alive at 28 days

[c] survival definition unknown

*Some researchers based their gestational estimation on the nearest week, others on the nearest completed week.

Source: Americans United For Life, Chicago

APPENDIX A

1. Philip et al, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 PEDIATRICS 122 (1981).

2. Dillon et al., *Aggressive Obstetric Management in Late Second Trimester Deliveries*, 58 OBST. GYN. 685 (1981).

3. Herschel et al., *Survival of Infants Born at 24 to 28 Weeks' Gestation*, 60 OBST. GYN. 154 (1982).

4. Koops et al., *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 J. PEDIAT. 969 (1982).

5. Worthington et al., *Factors Influencing Survival and Morbidity with Very Low Birth Weight Delivery*, 62 OBST. GYN. 550 (1983).

6. Milner et al., *Limit of Fetal Viability*, [Letter] 1 (8385) LANCET 1079 (May 1984).

7. Goldenberg et al., *Survival of Infants with Low Birth Weight and Early Gestational Age, 1979 to 1981*, 149 AM. J. OBST. GYN. 508 (1984).

8. Gilstrap et al., *Survival and Short-Term Morbidity of the Premature Neonate*, 65 OBST. GYN. 37 (1985).

APPENDIX B

MAJOR REASON FOR SEEKING ABORTION GIVEN BY 400 PATIENTS

	Saline (%)	Curretage (%)
School	17.5	7.0
Career, personal freedom	11.5	7.5
Medical complications	4.5	10.0
Financial strain	19.5	15.0
Unmarried	9.0	8.5
Too young	6.0	11.0
Fear of social disgrace	5.0	1.5
Family already completed	3.5	13.5
Shakey relationship with man involved	8.0	9.0
Children too close in age	2.0	4.0
Possession of own children jeopardized	1.0	1.0
Parental advice	2.0	0.5
Never wants children	0.5	1.0
Not fit to be a mother	1.5	3.0
Unwilling intercourse	—	0.5
Plans to marry abandoned	0.5	—
Too early in marriage	—	2.0
Too old	—	1.5
Didn't want to hurt family	4.5	0.5
Other	3.5	3.0

Source: Kerenyi, et al., *Reason for Delayed Abortion: Results of 400 Interviews*, 117 AM. J. OBST. GYN. 299, 307 (1973).

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No. 84-495

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE JOHN D. LANE, M.D., *ET AL.*, IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED FOR REVIEW

1. In reversing the district court's denial of a preliminary injunction against the operation of a state statute, did the court of appeals exceed the proper scope of review when it held that numerous provisions of the statute are unconstitutional?

2. Did the court of appeals err in holding unconstitutional, as a matter of law, the provisions of Pennsylvania's Abortion Control Act that specify certain types of information to be disclosed to a woman considering an abortion but do not limit the information to be provided?

3. Did the court of appeals err in enjoining the operation of the otherwise constitutional parental consent-judicial authorization provisions of the Act concerning abortions for minors because of the absence of rules by the Pennsylvania Supreme Court concerning the confidentiality and expedition of proceedings thereunder, even though the statute itself contains specific instructions requiring confidentiality and a decision within three business days?

4. Did the court of appeals err in holding unconstitutional the requirement in § 3210 of the Act that a second physician attend a post-viability abortion to provide reasonable medical care for a child who survives the abortion, on the ground that the § 3210(a) exception to "the requirements of this section" in the case of abortions "necessary to preserve maternal life or health" does not apply to the second physician requirement, despite the district court's interpretation to the contrary?

5. Did the court of appeals err in striking down § 3210(b) of the Act by rejecting the district court's constitutional interpretation of that provision in favor of a different interpretation that, in the view of the court of appeals, rendered the statute unconstitutional?

IDENTIFICATION OF AMICI CURIAE JOHN D. LANE, M.D., *ET AL.*, AND OF PARTY SUPPORTED

Pursuant to Rule 36.2 of the Rules of the Court and the previously-filed written consent of the parties to this case, Amici Curiae John D. Lane, M.D., *et al.*, file this brief in support of appellants (hereinafter, the "Commonwealth"). These amici participated as amici both in the district court (175a-176a) and in the court of appeals (5a).* They are physicians (two of whom are certified by the American Board of Obstetrics and Gynecology and one of whom is the parent of an unemancipated minor daughter) and a non-profit corporation that offers counselling services to pregnant women.

* References denominated as ____a are to the Appendix to the Jurisdictional Statement. The Joint Appendix is referred to as J.A. ____a.

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On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE JOHN D. LANE, M.D., *ET AL.*, IN SUPPORT OF APPELLANTS

STATEMENT OF THE CASE

This case was initiated on October 4, 1982. In their complaint, plaintiff-appellees allege that Pennsylvania's Abortion Control Act, 18 Pa. C.S.A. § 3201 *et seq.* ("the Act"), is unconstitutional. The Act was signed by the Governor of Pennsylvania on June 11, 1982, almost four months before suit was filed. It contains certain provisions of Pennsylvania's 1974 Abortion Control Act[1] that were up-

1. Former 35 P.S. § 6601 *et seq.* (repealed 1982).

held in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975) (three judge court), *summarily aff'd sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976), together with other provisions designed to take into account decisions of this Court that were handed down between 1974 and 1982.[2]

Approximately four weeks after filing their complaint, plaintiff-appellees filed, on October 29, 1982, a motion seeking a preliminary injunction. The Act was scheduled to take effect on December 8, 1982.

In response to a November 18 Order of the district court setting a deadline of November 30, 1982, plaintiff-appellees and the Commonwealth entered into a stipulation of facts. The stipulation was made "solely for the purpose of the motion for preliminary injunction." 176a n.1. It expressly states that it was entered into "without prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding" in the case. J.A. 9a-10a. As a result of the stipulation, there was no evidentiary hearing on the preliminary injunction motion, and the district court heard oral argument on that motion on December 2, 1982.

On December 7, 1982, the district court issued an Order in which it enjoined the 24-hour waiting period in § 3205(a)(1) of the Act but denied plaintiff-appellees' motion in all other respects. The district court issued its opinion in support of the December 7 Order three days later, on December 10, 1982.

In the meantime, on December 8, 1982, plaintiff-appellees appealed from the district court's Order. That same day, the district court denied a request for an injunction pending appeal. Plaintiff-appellees then requested the

2. An earlier version of the 1982 Act that had been passed by the Pennsylvania legislature was vetoed by the Governor of Pennsylvania on the ground that certain of that bill's provisions were constitutionally suspect. The legislature then passed a new bill in which the suspect provisions were either deleted or modified. The Governor signed that bill, which thus became the Act.

court of appeals to issue an injunction pending appeal. On December 9, 1982, the court of appeals (a) granted an injunction pending appeal "until further order" and (b) set a deadline for the Commonwealth to respond to the request for a stay. After hearing argument, the court of appeals granted the motion for an injunction pending appeal, denied the Commonwealth's motion to vacate the December 9 stay, and ordered expedited consideration of the case.

After expedited briefing and argument, the court of appeals withheld action pending the decisions of this Court that were subsequently issued in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron*"), and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) ("*Ashcroft*"). After *Akron* and *Ashcroft* were decided, the parties submitted supplemental briefs and the court of appeals heard argument again.

On May 31, 1984, the court of appeals issued the decision that is now before this Court. Chief Judge Seitz dissented from many of the panel's holdings of unconstitutionality. 132a-152a, 737 F.2d at 312-16.

The Commonwealth requested rehearing *en banc*. That request was denied over the dissents of Chief Judge Aldisert and Judges Adams, Gibbons, and Weis. This appeal followed.

SUMMARY OF ARGUMENT

The court of appeals went beyond the proper scope of review of the district court's decision not to enjoin preliminarily the operation of a state statute. But far more important than the court of appeals' "reaching out" to strike down a carefully tailored state statute is the fact that the court's holdings of unconstitutionality are wrong.

In particular, the court of appeals erred in holding that the disclosure provisions of the informed consent section of the Act should be enjoined. Virtually every one of the disclosure provisions of the Act has been specifically upheld by this Court, and those that have not been specifically addressed by this Court are clearly permissible under the Court's reasoning in prior cases. Under these circumstances, the court of appeals erred in refusing to honor the legislative direction of severability so as to sever the constitutional disclosure standards from the requirements (1) that the disclosures be made 24 hours before obtaining the woman's consent to the abortion and (2) that some of the disclosures be made by a physician.

Similarly, the court below erred in holding that the provisions of the Act concerning parental consent to or judicial authorization of abortions for minors should be enjoined on the ground that the state supreme court had not yet issued supplementary rules of procedure. That ground had already been considered and rejected in *Ashcroft*. The Pennsylvania Act's parental consent-judicial authorization provisions comply in every detail with this Court's decisions. No supplementary court rules are necessary, given the statute's explicit and specific instructions concerning the confidentiality and expedition required in such proceedings.

The court of appeals also ignored the clear language of the Act in holding that there is no statutory exception for medical emergencies in the case of the requirement that a second physician charged with the care of the child who survives an abortion must attend post-viability abortions.

Since the Act does contain a medical emergency exception, it is clearly constitutional under *Ashcroft*.

Finally, the court of appeals erred in rejecting the district court's admittedly constitutional construction of the statutory provision concerning the types of abortion techniques to be used in post-viability abortions in favor of the court of appeals' own unconstitutional construction.

ARGUMENT

I. THE COURT OF APPEALS EXCEEDED THE APPLICABLE SCOPE OF REVIEW OF AN ORDER DENYING PRELIMINARY RELIEF.

The court below had before it an appeal from the denial of a preliminary injunction against the operation of a state statute that had been passed overwhelmingly by the Pennsylvania legislature and signed by the Governor of Pennsylvania after being modified by the legislature to take into account the Governor's concerns over the constitutionality of a prior bill that he had vetoed. When faced with an appeal from a denial of preliminary relief, the courts of appeals normally accord great deference to the district court's balancing of the relevant factors, absent an abuse of discretion, an "obvious" or "clear" error of law, or a serious mistake in considering the proof. See, *e.g.*, *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 357 (3d Cir. 1980); *Gabrilowitz v. Newman*, 582 F.2d 100, 102 (1st Cir. 1978).

In its decision, the district court carefully weighed the factors relevant to preliminary relief and concluded that plaintiff-appellees had, except as to one provision, failed to meet their burden of showing that the Governor and the legislature of Pennsylvania had more likely than not transgressed constitutional limits. Nevertheless, the court of appeals in this case, in apparent reliance on "an unusually complete factual . . . presentation," 21a, 737 F.2d at 290 — a presentation that was embodied in a stipulation entered into "solely for the purpose of" the preliminary injunction motion (176a n.1) and "without prejudice to any party's right to controvert any facts or to prove any additional facts" later in the case (J.A. 9a-10a) — decided to forgo the "customary discretion accorded to a district court's ruling on a preliminary injunction." 21a, 737 F.2d at 290. Instead, the court of appeals decided as a final matter at least some of "the important constitutional issues at stake" — those the court held to be unconstitutional — on

the basis of its "plenary scope of review as to the applicable law." *Id.*

However, in the case of the three specific provisions that the court of appeals found to be constitutional, it either enjoined the statute's operation anyway or indicated that it would enjoin those provisions if the "unusually complete factual . . . presentation" (21a, 737 F.2d at 290) embodied in the stipulation were supplemented. Thus, the court enjoined the operation of the parental consent-judicial authorization for minors provision on the ground that the Pennsylvania Supreme Court had not yet promulgated rules saying that the Pennsylvania legislature really meant what it specifically said concerning the confidentiality and expedition with which such proceedings should be conducted. Similarly, in refusing to enjoin the prohibition, in § 3210(a) of the Act, of medically unnecessary abortions of viable fetuses, the court stated that it "remain[s] deeply concerned" and that, "*At this stage of the proceeding*, and in light of the Supreme Court's reiteration of the state's power to prohibit abortion of a viable fetus unless medically necessary, *we are compelled* to reject any challenge to the facial validity of this provision." 67a, 68a, 737 F.2d at 299, 300 (emphasis added). See also 57a, 737 F.2d at 297 (where the court stated, in upholding the requirement that abortion facilities file reports concerning their ownership and corporate affiliations, that plaintiff-appellees "have not *as yet* demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights.") (emphasis added).

We agree with the Commonwealth that the court of appeals' thinly disguised hostility to the actions of the legislature and the Governor of Pennsylvania led the court to exceed the proper scope of its review of the district court's disposition of a request for preliminary relief enjoining a state statute. See Jurisdictional Statement at 10-14, citing *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940), and *Withrow v. Larkin*, 421 U.S. 35 (1975). But

even more important than the court of appeals' rush to prejudgment is the fact that its holdings of unconstitutionality are wrong — in some cases obviously so — as we now show.

II. THE INFORMED CONSENT PROVISIONS OF THE ACT ARE CONSTITUTIONAL.

Section 3205(a) of the Act provides, "No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced." The section also sets disclosure standards that must be met, "[e]xcept in the case of a medical emergency," for consent to be informed within the meaning of the Act. 18 Pa. C.S.A. § 3205(a)(1). Compliance with § 3205 shields a physician from civil liability on the ground of failure to obtain informed consent to the abortion. 18 Pa. C.S.A. § 3205(d).

After carefully reviewing § 3205, the district court concluded that the disclosure provisions of that section "do not interfere with the woman's fundamental right to decide to have an abortion." 213a, 552 F. Supp. at 800. In doing so, it relied in part on the stipulated facts that

> "Women who undergo abortions are not always told of . . . the full nature and effect of the procedure they will undergo. . . . In fact, some of the women who do undergo abortions would not have had an abortion if they were provided with all the information required to be provided by the Act." 207a, 552 F. Supp. at 799.

The court of appeals, on the other hand, held that the informed consent provision of the Act "is invalid, and cannot be enforced." 50a, 737 F.2d at 296. However, the court of appeals never really explains why or how the disclosure standards of § 3205 offend constitutional limitations. It conceded that at least "*some* of the information listed in the Pennsylvania Act would be unobjectionable standing alone," and that "the state may require in general terms that the woman be provided with information needed to

secure her consent." 49a, 737 F.2d at 296. Yet, the court, relying on *Akron*, invalidated § 3205 because its provisions "are not severable." *Id.*

But even assuming *arguendo* that the section is not severable — despite the state legislature's mandate to the contrary in § 5 of the Act, 279a[3] — the court of appeals never identifies even one disclosure provision in § 3205(a) that so taints the whole section as to require the entire section, including its concededly constitutional aspects, to be enjoined.

The reason is clear: each of the disclosure standards of § 3205(a) either has been specifically upheld as constitutionally permissible or is otherwise clearly permissible, as we now show.

1. Section 3205(a)(1)(i) provides that the woman upon whom the abortion is to be performed must be provided with "The name of the physician who will perform the abortion." The court below concedes that this provision is constitutional. 49a, 737 F.2d at 296. Given the emphasis on the physician-patient relationship in this Court's decisions, any argument that it is unconstitutional to require that a woman about to undergo an abortion must be told who will perform the procedure would be frivolous. See *Charles v. Carey*, 627 F.2d 772, 783 (7th Cir. 1980). Indeed, a failure to identify beforehand the physician who will perform the procedure could very well violate common law duties owed by a physician to the patient. See *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983).

2. Section 3205(a)(1)(ii) requires that the patient be informed that "there may be detrimental physical and psychological effects which are not accurately foreseeable." The identical requirement contained in Pennsylvania's 1974 Abortion Control Act was upheld in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 573, 587-88,

3. We show below that in this case there is no good reason for refusing to honor the legislature's direction of severability. See pages 12-14, *infra*.

594 (E.D. Pa. 1975) (three judge court), *summarily aff'd sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) ("*Fitzpatrick*"). *Akron* gives no indication that this Court's summary affirmance in *Fitzpatrick* is to be disturbed on this point. Compare *Akron*, 462 U.S. at 451 n.44 (where the Court, in striking down the portion of the ordinance in *Akron* requiring the "humane and sanitary" disposal of fetal remains, distinguished a similar requirement at issue in *Fitzpatrick*). In fact, in *Akron* this Court specifically stated, "Consistent with its interest in ensuring informed consent, a State *may* require that a physician make certain that his patient understands the physical and emotional implications of having an abortion." *Id.* at 445 (emphasis added).

Unlike the ordinance at issue in *Akron*, which spelled out a specific listing of serious complications that had to be told to the patient (see *Akron*, 462 U.S. at 423 n.5, quoting § 1870.06(B)(5) of the Akron ordinance), this provision does not contain a " 'parade of horribles' intended to suggest that abortion is a particularly dangerous procedure." *Id.* at 445.

3. Section 3205(a)(1)(iii) requires that the patient be informed of the "particular medical risks associated with the particular abortion procedure to be employed including, *when medically accurate*, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility" (emphasis added). In *Akron*, this Court specifically approved the informational content aspect of the section of the Akron ordinance which required that a woman be informed of the particular risks of the abortion procedure she is to undergo. 462 U.S. at 446-47. Indeed, that is consistent with what the law requires in the case of *any* medical procedure. See, *e.g.*, 35 P.S. §§ 5641-42 (relating to informed consent requirements in the case of treatment for breast cancer). The *Akron* provision which required that a woman be informed "of the particular risks associated with her own pregnancy and the abortion technique to be employed" (462 U.S. at 446) was struck down only because that provision had other, unconstitutional aspects.[4]

The identification in § 3205(a)(1) (iii) of certain particular categories of risk (*e.g.*, infection and hemorrhage) does not distinguish the informational content of this provision from the informational content of the provision that the Court found acceptable in *Akron*. The categories of risk specified in the Pennsylvania Act need be indicated to a particular patient only when it is "medically accurate" to do so; the determination of medical accuracy is left entirely to the physician's discretion. See Statement of Judge Weis Sur Petition for Rehearing ("Judge Weis' Statement"), at 163a, 737 F.2d at 318.

4. Section 3205(a)(1)(iv) requires that the woman be informed of the "probable gestational age of the unborn child at the time the abortion is to be performed." In *Akron*, the Court held that "[t]his information . . . certainly is not objectionable." 462 U.S. at 445-46 n.37. See Judge Weis' Statement, at 164a-165a, 737 F.2d at 318.

5. Section 3205(a)(1)(v), which requires that the woman be informed of the "medical risks associated with carrying her child to term," is constitutional for the same reasons that requiring information regarding the risks of abortion is constitutional. *Akron*, 462 U.S. at 446-47.

6. Section 3205(a)(2)(i) requires that the woman be informed of the "fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care." In *Akron*, the Court indicated that a similar but much more detailed requirement "certainly is not objectionable." 462 U.S. at 423-24 n.5 (quoting § 1870.06(B)(7) of the Akron ordinance), 445-46 n.37.

7. Section 3205(a)(2)(ii) requires that the woman be informed of the incontrovertible fact that "the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion." Although no

4. In discussing this particular provision of the Akron ordinance, the Court did not address the question of severability. We discuss the severability issue at pages 12-14, *infra*.

such provision was under review in *Akron*, the same reasoning upholding the requirement that a woman be informed of the availability of medical assistance benefits applies to information regarding paternal responsibility for support.

8. Section 3205(a)(2)(iii) requires that the patient be informed of her right to review printed materials that "describe the unborn child and list agencies which offer alternatives to abortion." Under *Akron*, the agency listing requirement is plainly constitutional. See 462 U.S. at 423-24 n.5 (quoting § 1870.06(B)(7) of the Akron ordinance), 445-46 n.37 ("This information, to the extent it is accurate, certainly is not objectionable. . . ."). Furthermore, unlike the ordinance in *Akron*, which required that every woman actually be told detailed information regarding fetal physiology (see § 1870.06(B)(3) of the Akron ordinance, quoted at 462 U.S. at 423 n.5), this provision of the Act leaves the choice up to the woman to decide whether to read such information. See 139a-140a, 737 F.2d at 314 (Seitz, C.J., dissenting); Statement by Circuit Judge Adams Sur Denial of Petition for Rehearing at 157a, 737 F.2d at 316; Judge Weis' Statement, at 164a, 737 F.2d at 318.

Under the Act, the physician — or a counselor[5] — is perfectly free to comment or not to comment on the materials, should the woman express a desire to review them. See 140a, 737 F.2d at 314 (Seitz, C.J., dissenting). No limitation is placed on the content of the discussion between the woman and the physician or counselor. Physicians and counselors remain free under the Act to advocate or "skew" a woman's decision in favor of abortion, if they so desire.

The Supreme Court did not uphold these and other provisions in the *Akron* ordinance even though it found them constitutionally permissible only because these

5. Section 3205(a)(2) explicitly provides that the disclosures contained therein may be made "by the physician *or his agent*" (emphasis added). See 134a-135a, 737 F.2d at 313 (Seitz, C.J., dissenting).

unobjectionable provisions were coupled with other, constitutionally impermissible informational requirements, and because the Akron ordinance required that the information be given to the woman by a physician. The combination of these factors prompted the Court to refuse to sever the valid subsections from the invalid subsections.

But the *Akron* informed consent provision was significantly more complicated, interrelated, and burdensome than the disclosure provisions in § 3205 of the Act. The Court found in *Akron* that the ordinance there in question imposed a " 'parade of horribles.' " 462 U.S. at 445. As a result, it is no wonder that the Court refused in *Akron* to speculate whether the legislative body would retain the permissible portions of the ordinance in the absence of the impermissible portions.

On the other hand, that is not the case with the Pennsylvania Act, where every single disclosure provision is constitutionally permissible. In short, § 3205 does not present a situation where severing a number of unconstitutional provisions from the constitutional informational content provisions would "create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).[6]

Given the vast difference between the largely impermissible requirements in *Akron* and the completely acceptable disclosure requirements of the Act, this Court should honor the legislative declaration of severability contained in § 5 of the Act. 279a. This is especially appropriate here because the result of implementing the disclosure standards of § 3205 will be to *protect* women considering abortions.

The constitutional right announced in *Roe v. Wade*, 410 U.S. 113 (1973), "was the right of a pregnant woman to decide whether *or not* to bear a child without unwarranted

6. As Chief Judge Seitz pointed out in his partial dissent, 134a-135a, 737 F.2d at 313, the "physician only" requirement applies only to the disclosures contained in § 3205(a)(1); it does not apply to the disclosures contained in § 3205(a)(2). See page 12 n.5, *supra*.

state interference." *Whalen v. Roe*, 429 U.S. 589, 605 n.33 (1977). The Court's holding in *Roe v. Wade* "was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 90 (1976) (Stewart, J., concurring). As Justice Powell stated in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), "The Court recognized [in *Danforth*] that the decision to abort 'is an important, and often a stressful one,' and the State thus constitutionally could assure that the woman was aware of the significance of the decision." 431 U.S. at 705 (concurring opinion) (citation omitted). See also *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part) ("The *overriding consideration* is that the right to make the choice be exercised as wisely as possible.") (emphasis added). Section 3205 is narrowly drafted to meet that "overriding consideration."

The court of appeals seemed to assume that § 3205 "imposes objectionable obstacles to 'the responsibility of the physician to ensure that appropriate information is conveyed to his patient. . . .'" 48a-49a, 737 F.2d at 296, quoting *Akron*, 462 U.S. at 443. This conclusion is based on the unstated assumption that § 3205 somehow restricts the content of the dialogue between the patient considering an abortion and the physician or counselor.

But nowhere does the Act prohibit a physician or counselor from furnishing information in addition to that set forth in § 3205. See 140a, 737 F.2d at 314 (Seitz, C.J., dissenting). In fact, § 3205(a)(1)(iii) specifically recognizes that even some of the information set forth therein ("the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility") need not be disclosed, if that information is not medically accurate. Nowhere does the Act preclude a physician from exercising his best medical judgment to tailor information necessary for informed consent to meet the particular needs of the individual woman.

A requirement that *enhances* the right of a pregnant woman to decide "whether *or not* to terminate her pregnancy," *Harris v. McRae*, 448 U.S. 297, 329-30 (1980) (Brennan, J., dissenting) (emphasis added), is constitutional. Section 3205 is designed to protect the woman considering an abortion by insuring that she makes the abortion decision "in a knowing, intelligent, and voluntary fashion." *Danforth*, 428 U.S. at 90 (Stewart, J., concurring). Thus, § 3205 actually advances rather than impinges on the right. Accordingly, it is constitutional, and the court of appeals should be reversed.

III. THE PROVISION OF THE ACT CONCERNING PARENTAL CONSENT TO OR JUDICIAL AUTHORIZATION OF ABORTIONS FOR MINORS IS CONSTITUTIONAL EVEN IN THE ABSENCE OF ANY SUPPLEMENTARY JUDICIAL RULES OF IMPLEMENTATION.

Section 3206 of the Act provides that, except in the case of a medical emergency, a physician shall not perform an abortion upon an unemancipated minor without first obtaining the consent of one of the minor's parents. 18 Pa. C.S.A. § 3206(a). If both parents refuse to consent, or if the minor prefers not to seek the consent of either parent, the minor may petition the courts to authorize the abortion, and the court "shall" authorize the abortion "if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." *Id.*, § 3206(c). Finally, if the court determines that the minor "is not mature and capable of giving informed consent," the court is nevertheless required to authorize the abortion if the abortion "would be in the best interests of the [minor]." *Id.*, § 3206(d).

There can be no doubt that the parental consent-judicial authorization for minors provision of the Act is constitutional under *Bellotti v. Baird*, 443 U.S. 622

(1979) ("*Bellotti-II*") and *Ashcroft*.[7] Indeed, the Act virtually mirrors the requirements that such a provision must meet in order to be constitutional under *Bellotti-II* and *Ashcroft*.[8]

This Court has held that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti-II*, 443 U.S. at 643 (footnote omitted). The Commonwealth has provided such an alternative procedure in § 3206(c)-(f) and (h) of the Act. Furthermore, the minor must be able to obtain judicial authorization for the abortion if "she is mature enough and well enough informed to make her abortion decision . . . independently of her parents' wishes." *Id*. The Pennsylvania Act specifically provides that the court "*shall* . . . authorize a physician to perform the abortion if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." 18 Pa. C.S.A. § 3206(c) (emphasis added).

7. The test for the validity of restrictions on the privacy rights of minors, including the right to decide whether to have an abortion, is less rigorous than in the case of restrictions on the privacy rights of adults. See, *e.g.*, *Carey v. Population Services Int'l*, 431 U.S. 678, 693 n.15 and accompanying text (1977) (Brennan, J., joined by Stewart, Marshall, and Blackmun, JJ.). See also *id*. at 703 (Powell, J., concurring). In any event, § 3206 is clearly constitutional under the specific guidelines of *Bellotti-II* and *Ashcroft*.

8. The *Bellotti-II* standards are set forth in Justice Powell's opinion in that case. Although Justice Powell's opinion was joined in by only three other justices, Justice White would have upheld the parental consent statute there at issue, which fell short of the requirements spelled out in Justice Powell's opinion. In any event, although in *Ashcroft* the dissenting members of the Court took issue with the significance of the opinions in *Bellotti-II*, they recognized that, after *Ashcroft*, a parental consent-judicial authorization statute that complies with Justice Powell's decision in *Bellotti-II* is constitutional. *Ashcroft*, 462 U.S. at 503-04. Accordingly, after *Ashcroft*, there is no doubt that the Pennsylvania Act, which meets the standards in Justice Powell's opinion in *Bellotti-II*, is constitutional.

Also, the minor must be able to obtain authorization for the abortion under the alternative procedure "even if she is not able to make this decision independently, [but] the desired abortion would be in her best interests." *Bellotti-II*, 443 U.S. at 644. Again, § 3206(d) of the Act specifically provides that the court "shall" authorize the abortion "[i]f the court determines that the performance of an abortion would be in the best interests of the [minor]."

Finally, the alternative procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti-II*, 443 U.S. at 644. Section 3206(f) of the Act specifically requires that court proceedings under § 3206 be confidential and be concluded promptly. In fact, the court is required to rule on the minor's petition within three business days of the date the proceeding is initiated, and an expedited confidential appeal is also required. 18 Pa. C.S.A. § 3206(f), (h).[9]

Ashcroft confirms the constitutionality of the Pennsylvania provision. Indeed, the judicial authorization provisions upheld in *Ashcroft* are, if anything, *less* protective of the minor's concerns than is § 3206 of the Pennsylvania Act. For example, the Missouri statute involved in *Ashcroft* required only that "A *hearing* . . . shall be held . . . within five days of the filing of the petition," whereas the Pennsylvania Act requires the court "to *rule* within three business days of the date of the application." Compare Mo. Rev. Stat. § 188.028.2(3), quoted in *Ashcroft*, 462 U.S. at 479-80 n.4 (emphasis added), with 18 Pa. C.S.A. § 3206(f) (emphasis added).

Even though the court of appeals recognized that the carefully crafted parental consent-judicial authorization provision of the Act clearly complies with *Bellotti-II* and *Ashcroft*, the court enjoined the operation of that provision

9. The Act requires that in determining whether to consent to or authorize an abortion for the minor, a parent and the courts must consider only the best interests of the minor. 18 Pa. C.S.A. §§ 3206(a), (d). See *Bellotti v. Baird*, 428 U.S. 132, 140-41, 144-46, 147 (1976).

"until the state promulgates regulations, without prejudice to the right of these . . . plaintiffs to attempt to demonstrate . . . that the regulations are unconstitutional." 56a, 737 F.2d at 297.[10] The court of appeals seems to have interpreted the Act as "*requiring* the Supreme Court of Pennsylvania to promulgate rules assuring confidentiality and promptness of disposition." 54a, 737 F.2d at 297 (emphasis added). It also states that the Pennsylvania Act is not as detailed as the Missouri statute upheld in *Ashcroft*. 53a-54a, 737 F.2d at 297.

However, the Act merely provides that the Pennsylvania Supreme Court "shall" issue such rules "*as may be necessary*" to assure confidentiality and expedition. 18 Pa. C.S.A. § 3206(h) (emphasis added). Compare with Mo. Rev. Stat. § 188.028.2(6) (providing that the state supreme court "shall, by court rule, provide for expedited appellate review . . . . ," 462 U.S. at 491 n.16), upheld in *Ashcroft* in the absence of any supplementary rules.[11] But even more important, this Court has already rejected this exact same ground as a basis for striking down the similar statute at issue in *Ashcroft*. The Court there said:

> "We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. . . . [T]o this point in time, there has been no need for the State Supreme Court to promulgate rules concerning appellate review. There is *no* reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions." 462 U.S. at 491 n.16.

10. Significantly, where, as here, the court of appeals upholds a provision of the Act, it nevertheless leaves open the possibility that the provisions may still be successfully challenged. On the other hand, where it holds that the district court erred in failing to issue a preliminary injunction against other provisions of the Act, it holds those provisions unconstitutional as a final matter.

11. The Pennsylvania Act similarly requires "[a]n expedited confidential appeal" that must take "sufficient precedence over other pending matters to ensure promptness of disposition." 18 Pa. C.S.A. § 3206(h).

See Judge Weis' Statement, at 167a, 737 F.2d at 318 ("I perceive no necessity to await such rules.").

The same applies equally here. The court of appeals erred in assuming that the state courts will fail to fulfill their constitutional — and statutory — obligations to provide confidential and expedited proceedings, including confidential and expedited appeals. Clearly, the Pennsylvania Act "provides the framework for a constitutionally sufficient means of expediting judicial proceedings," 462 U.S. at 491 n.16, and that is all that is required under *Ashcroft*.

Nowhere does the court of appeals indicate what specific procedures in addition to those in the statute itself must, as a constitutional matter, be spelled out in judicial rules in order to permit the statute to take effect. See Judge Weis' Statement, at 168a-169a, 737 F.2d at 318-19. In fact, the Pennsylvania courts are often faced with emergency matters and matters requiring confidentiality, especially in cases involving juveniles. As in the case of most (if not all) other courts, the Pennsylvania courts have emergency judge procedures designed to assure access to a judge at nights or on weekends and holidays. Thus, there *is*, even in the absence of rules specifically applicable to abortions, an "established and practical avenue" to achieve expedition and confidentiality, as sought by the court of appeals. 54a, 737 F.2d at 297. Indeed, the lack of any specific rules of procedure in the federal courts concerning confidentiality has never hampered those who wish to obtain judicial assistance in obtaining abortions from doing so on a confidential basis. That is why the law in this area is replete with case names such as *Roe v. Wade* or *Doe v. Bolton*, for example.

In short, the court of appeals' refusal to permit the parental consent-judicial authorization provisions of the Act to take effect flies in the face of *Bellotti-II* and *Ashcroft*. It should be reversed.

IV. THE REQUIREMENT THAT POST-VIABILITY ABORTIONS BE ATTENDED BY A SECOND PHYSICIAN CHARGED WITH TAKING REASONABLE STEPS TO PRESERVE THE LIFE AND HEALTH OF A CHILD WHO MAY SURVIVE THE ABORTION IS CLEARLY SUBJECT TO A STATUTORY EXCEPTION FOR MEDICAL EMERGENCIES AND IS THEREFORE CONSTITUTIONAL UNDER *ASHCROFT*.

Under *Roe v. Wade* the states may, "[f]or the stage subsequent to viability, . . . even proscribe" abortions except where necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. at 164-65. If a state may, in the case of viable infants, completely prohibit abortions except where necessary to preserve maternal life or health, *a fortiori* it certainly may require that a second physician with responsibility to protect the life of a viable infant who survives the abortion must be in attendance during the abortion procedure under the same circumstances. See *Margaret S. v. Edwards*, 488 F. Supp. 181, 200-01 (E.D. La. 1980) (upholding a second physician requirement). Thus, this Court upheld such a second physician requirement in *Ashcroft*. 462 U.S. at 494.

Nevertheless, the court of appeals held that the second physician requirement of § 3210(c) of the Pennsylvania Act is unconstitutional because, in its view, the section does not contain an exception for medical emergencies, as required by *Ashcroft*.

In his opinion joined in by Chief Justice Burger, Justice Powell noted in *Ashcroft* that Missouri's second physician requirement "is qualified, at least in part, by the phrase 'provided that it does not pose an increased risk to the life or health of the woman.' " *Ashcroft*, 462 U.S. at 485

n.8. Both Justice Powell and the dissenters agreed that this language does not create "a clear exception for emergency situations." *Id*. at 501 (dissenting opinion). See also *id*. at 485 n.8 (Opinion of Justice Powell).

On the other hand, the Pennsylvania statute at issue here clearly provides, in § 3210(a), that "[i]t shall be a complete defense to *any* charge brought against a physician for violating the requirements *of this section* . . . that the abortion was necessary to preserve maternal life or health" (emphasis added). Since the second physician requirement of § 3210(c) is one of the requirements of "this section" — § 3210 — the Act *does* provide a clear exception to the second physician requirement when, in order to preserve the mother's life or health, it is necessary to perform the abortion without the attendance of a second physician to care for the child. See Statement by Circuit Judge Adams Sur Denial of Petition for Rehearing, at 159a, 737 F.2d at 317.

That the § 3210(a) defense of necessity applies — and was intended to apply — to all of § 3210 and not just to § 3210(a) is clear from the fact that § 3210(c) makes a violation of that "*sub*section" a third degree felony (emphasis added). The use of the term "subsection" in § 3210(c) demonstrates that the Pennsylvania legislature knew how to limit the applicability of the necessity defense to a subsection of the Act if it had chosen to do so. See 144a-145a, 737 F.2d at 315 (Seitz, C.J., dissenting).

Indeed, the Pennsylvania Act is constitutional even under the more stringent test advocated by the dissenters in *Ashcroft*. In *Ashcroft*, Justice Blackmun stated in his dissenting opinion (in which the other dissenters joined), "While I agree [with the majority] that a second physician indeed may aid in preserving the life of a fetus born alive, this type of aid is possible only when the abortion method used is one that may result in a live birth." 462 U.S. at 499. The dissenters made it clear that they viewed Missouri's second physician requirement as "overbroad" and "not tailored to protect the State's legitimate interests" because the Missouri statute (unlike the Pennsylvania Act)

"require[s] a second physician to attend an abortion at which the chance of a live birth is nonexistent," when "any need for a second physician disappears." *Id*. at 500, 501.

However, § 3210(c) of the Pennsylvania Act requires the attendance of a second physician at an abortion when, in the good faith judgment of the physician performing the abortion, the method chosen by the physician "does not preclude the possibility of the child surviving the abortion." Thus, unlike the Missouri statute that was *upheld* in *Ashcroft* (462 U.S. at 494), the Act satisfies both of the two problems that *the dissenters* in *Ashcroft* found with the second physician requirement there at issue.

Accordingly, it is clear — clearer even than in the case of the statute at issue in *Ashcroft* — that the Pennsylvania Act's second physician requirement is subject to a medical emergency exception and is otherwise constitutional under *Ashcroft*.

V. THE REQUIREMENT THAT THE PHYSICIAN USE THE ABORTION TECHNIQUE PROVIDING THE BEST OPPORTUNITY FOR A VIABLE INFANT TO BE BORN ALIVE IS NOT CONTRARY TO THE CONSTITUTION.

Section 3210(b) of the Act provides that, "after an unborn child has been determined to be viable," a physician performing an abortion shall use the abortion procedure "which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health" of the mother. 18 Pa. C.S.A. § 3210(b).

In an effort to follow the well-established proposition that, if possible, a statute should be construed so as to avoid constitutional infirmities, the district court held that the phrase "significantly greater medical risk to the life or health" of the mother refers to any risk that would — "in

the good faith judgment of the physician," § 3210(b) — influence to *any* extent the physician's determination of the best procedure to be used from the standpoint of the woman's life or health. 242a-249a, 552 F. Supp. at 806-07. As the court of appeals recognized, "Under that construction, if the abortion technique that would save the fetus involves an increased risk to a mother, then the procedure safest for the mother must be used." 69a-70a, 737 F.2d at 300.

Nevertheless, the court of appeals substituted instead its own construction of the statute — a construction it then found to be unconstitutional — on the ground that § 3210(b) "is not susceptible" to a construction that is constitutional. 70a-71a, 737 F.2d at 300.

However, as the district court pointed out, the key term, "significantly greater" medical risk, is clearly susceptible to a constitutional interpretation. In particular, the district court stated:

> "Significant can be understood to mean measurable or worthy of consideration in contrast with insignificant, or not measurable or not worthy of consideration. Websters' Third New International Dictionary defines significant as 'having meaning,' 'having or likely to have influence or effect,' and 'probably caused by something other than chance.' When significant is defined in this way, the term 'significantly greater risk' means any meaningful risk or any risk which would influence the exercise of medical judgment. Thus, the Act requires that after viability, the physician select the technique most likely to result in the live abortion of the viable fetus so long as there is no additional risk to the woman. So interpreted, the statute is constitutional for the reasons stated by the court in *Ashcroft*." 248a-249a, 552 F. Supp. at 807.

See also *The Oxford English Dictionary* (1933), defining "significantly" as "In a significant manner; so as to convey some meaning; expressively, meaningly."

In support of its unconstitutional construction of the Act, the court of appeals cites 2A Sands, *Sutherland Statutory Construction* § 45.11. But the court of appeals ignores that part of § 45.11 to the effect that even " 'a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality.' " *Id.* (4th ed. 1984).

The court of appeals also suggests that a constitutional interpretation of § 3210(b) does not comport "with the *probable* intent of the legislature." 70a, 737 F.2d at 300 (emphasis added). The court does not give any citation for its conjecture as to a "probable" unconstitutional intent on the part of Pennsylvania's legislature and Governor, who had vetoed a prior bill because of his concerns over its constitutionality. Instead, the court of appeals relies solely on its view of "the legislative intent reflected in [the statute's] language." *Id.* Of course, that reasoning is circular. It is also contrary to the Pennsylvania legislature's own declaration of its intent, expressed in § 3202(c) of the Act entitled "Construction" (calling for an interpretation that protects the unborn and encourages childbirth to the extent "possible to do so *without violating the Federal Constitution*," emphasis added).

Accordingly, § 3210(b) should be upheld.

CONCLUSION

For the foregoing reasons, amici curiae John D. Lane, M.D., *et al.*, respectfully request the Court to reverse those portions of the court of appeals' judgment invalidating the disclosure standards of § 3205 (including § 3208), the parental consent-judicial authorization provisions of § 3206, the second physician requirement of § 3210(c), and the abortion technique provision of § 3210(b) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 28.5(b) of the Rules of this Court, John E. McKeever, being a member of the Bar of this Court, hereby certifies that three copies each of the foregoing Brief of Amici Curiae John D. Lane, M.D., *et al.*, in Support of Appellants have been served on all parties required to be served, by first class mail at Philadelphia, Pennsylvania, this 15th day of July, 1985. The names and addresses of those parties are:

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No. 84-495

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INTEREST OF THE AMICI CURIAE

The amici curiae consist of 82 members of the Congress of the United States, of which are the members of the Senate and members of the House of Representatives, as follows:

Sen. James Abdnor (R-S.Dak.), Rep. Richard K. Armey (R-Tex.), Rep. Robert E. Badham (R-Cal.), Rep. Steve Bartlett (R-Tex.), Rep. Joe Barton (R-Tex.), Rep. Herbert H. Bateman (R-Va.), Rep. Thomas J. Bliley, Jr. (R-Va.), Rep. David E. Bonior (D-Mich.), Rep. Robert A. Borski (D-Pa.), Rep. Beau Boulter (R-Tex.), Rep. Dan Burton (R-Ind.), Rep. William Carney (R-N.Y.), Rep. William W. Cobey, Jr. (R-N.C.), Rep. E. Thomas Coleman (R-Mo.), Rep. Larry E. Craig (R-Idaho), Rep. Phillip M. Crane (R-Ill.), Rep. William E. Dannemeyer (R-Cal.), Rep. Hal Daub (R-Nebr.), Rep. Robert W. Davis (R-Mich.), Rep. Thomas D. DeLay (R-Tex.), Sen. Jeremiah Denton (R-Ala.), Rep. Michael DeWine (R-Ohio), Rep. Robert K. Dornan (R-Calif.), Sen. Dave Durenberger (R-Minn.), Rep. Bill Emerson (R-Mo.), Rep. Jack Fields (R-Tex.), Sen. Phil Gramm (R-Tex.), Sen. Charles Grassley (R-Iowa), Rep. Kenneth J. Gray (D-Ill.), Rep. James V. Hansen (R-Utah), Rep. Thomas F. Hartnett (R-S.C.), Sen. Orrin G. Hatch (R-Utah), Sen. Mark O. Hatfield (R-Oreg.), Rep. Paul B. Henry (R-Mich.). Sen. Gordon J. Humphrey (R-N.H.), Rep. Duncan Hunter (R-Calif.), Rep. Earl Hutto (D-Fla.), Rep. Henry J. Hyde (R-Ill.), Sen. Bob Kasten (R-Wis.), Rep. Jack F. Kemp (R-N.Y.), Rep. Thomas N. Kindness (R-Ohio), Rep. John J. LaFalce (D-N.Y.), Rep. Robert J. Lagomarsino (R-Calif.), Rep. Norman F. Lent (R-N.Y.), Rep. William O. Lipinski (D-Ill.), Rep. Bob Livingston (R-La.), Rep. Tom Loeffler (R-Tex.), Rep. Thomas A. Luken (D-Ohio), Rep. Edward R. Madigan (R-Ill.), Rep. Thomas J. Manton (R-N.Y.), Rep. Nicholas Mavroules (D-Mass.), Rep. Romano L. Mazzoli (D-Ky.), Sen. James A. McClure (R-Idaho), Rep. Clarence E. Miller (R-Ohio), Rep. Alan B. Mollohan (D-W.Va.), Rep. Carlos J. Moorhead (R-Calif.), Rep. Austin J. Murphy (D-Pa.), Sen. Don Nickles (R-Okla.), Rep. James L. Oberstar (D-Minn.), Rep. Ron Packard (R-Calif.), Rep. Timothy J. Penny (D-Minn.), Rep. Thomas E. Petri (R-Wis.), Rep. Jim Saxton (R-N.J.), Rep. F. James Sensenbrenner, Jr. (R-Wis.), Rep. Norman D. Shumway (R-Calif.), Rep. Mark D. Siljander (R-Mich.), Rep. Ike Skelton (D-Mo.), Rep. Christopher H. Smith (R-N.J.), Rep. Denny Smith (R-Oreg.), Rep. Robert C. Smith (R-N.H.), Rep. Harley O. Staggers, Jr. (D-W.Va.), Rep. Arlan Stangeland (R-Minn.), Rep. Charles W. Stenholm (D-Tex.), Rep. Patrick L. Swindall (R-Ga.), Sen. Steven D. Symms (R-Idaho), Rep. Thomas J. Tauke (R-Iowa), Sen. Strom Thurmond (R-S.C.), Rep. Harold L. Volkmer (D-Mo.), Rep. Barbara F. Vucanovich (R-Nev.), Rep. Vin Weber (R-Minn.), Rep. Frank R. Wolf (R-Va.), Rep. Robert A. Young (D-Mo.)

The amici curiae, as Members of the Congress of the United States, are vested by Article II, Section I, of the Constitution, with all legislative power granted in the Constitution. It is their sworn duty and common purpose "to support and defend" the Constitution of the United States.

Under the Constitution, each coordinate branch of the federal government has a duty to insure that the federal government, through each of its branches, maintains and respects the limits on their powers as prescribed by the Constitution. When one branch of the federal government exceeds its proper authority, it is the duty of the other coordinate branches to take measures that are reasonable and prudent to correct this imbalance. Members of Congress share with the other coordinate branches an interest in maintaining this constitutional balance.

The unique interest of the amici curiae in the preservation of these essential principles of the American Constitution is not represented by other parties in this case. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Supreme Court, in *Roe v. Wade*, 410 U.S. 113 (1973), based its decision on selective and disputable historical data. The Court did not acknowledge the prevailing cultural, legal and medical abhorrence of abortion since recorded history, up to *Roe*. It is the intent of the amici curiae, herein, to supplement the facts, correct the inaccuracies and challenge the interpretation of the historical circumstances in which *Roe* and its progeny have emanated. It is the position of the amici curiae that this Court cannot fully and fairly address the substantive issues in the two cases at bar with the jurisprudential wisdom required of this nation's highest Court without reviewing the premises and rationale of *Roe*.

It is the contention of the amici curiae that the Court exceeded its judicial authority in its finding of a previously unrecognized constitutional right to abortion. Furthermore, the amici curiae respectfully submit that the framers of the U.S. Constitution and of the Fourteenth Amendment did not intend to create a right to abortion. While fully deferring to the Supreme Court's authority to interpret laws, it is the view of the amici curiae that there was insufficient basis for the Court's conclusion in *Roe* that prenatal life was or is beyond the power of the States to protect. Therefore, this honorable Court should uphold the state laws invalidated by the courts below as appropriate exercises of state power to serve its compelling interest to protect prenatal life through legislation and regulation.

ARGUMENT

I.

THE SUPREME COURT'S DECISION IN *ROE V. WADE* IS IN OPPOSITION TO THE HISTORICAL TREATMENT OF ABORTION AT COMMON LAW AND BY EARLY AMERICAN ABORTION LAWS.

The Court's sweeping decision in *Roe v. Wade*, 410 U.S. 113 (1973), which resulted in abortion-on-demand, clearly conflicts with the treatment of abortion at common law, early American abortion laws, and by laws enacted by the state legislatures at the time of the decision. Virtually every historical, medical and legal argument the Court utilized in support of *Roe* has been subjected to intense scholarly criticism.

After reviewing the development of abortion as a crime at common law and relying heavily on the analysis of Professor Cyril H. Means, an advocate of legalized abortion, the Majority in *Roe* concluded.:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.

Roe, 410 U.S. at 140.

The Court's conclusions and its acceptance of the common law analysis of Professor Means was clearly contrary to the actual

treatment of abortion at common law, with respect not only to maternal health, but also to the protection of the life of the fetus.

When Justice Blackmun delivered the Court's opinion on January 22, 1973, not a single abortion statute in any State of the Union stood. Even the State of New York, which had one of the most unrestrictive abortion statutes and which allowed abortion on demand through the 24th week of pregnancy,[1] was too restrictive of the abortion right for a majority of the Court.

On the same day that *Roe* was decided, the Court also handed down the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973). The Court stressed in *Roe*, "[t]hat opinion and this one, of course are to be read together." *Roe*, 410 U.S. at 165. In *Doe*, the Court, making reference to its earlier decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), construed the meaning of "mother's life or health":

> That . . . has been construed to bear upon psychological as well as physical well-being . . . . [T]he medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health.

As a result of these two abortion decisions and their progeny, no State may constitutionally prohibit abortion at any time during pregnancy. After the end of the first trimester (first three months), it may promulgate regulations to protect *maternal* health, but not to impede abortion. After viability, the State may "proscribe" abortion only when the woman considering abortion can find no

1. N.Y. Penal Law, Section 125.05(3) (1977).

physician willing to verify that her mental health would, for example, be "taxed by child care" or suffer "distress . . . associated with the unwanted child." *Roe*, 410 U.S. at 153. In effect, therefore, as then Yale Law School Professor John Hart Ely has written, "[T]he statutes of most states must be unconstitutional *even as applied to the final trimester* . . . . [E]ven after viability the mother's life *or health* (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience . . .) must, as a matter of constitutional law, take precedence over . . . the fetus's life . . . ."[2]

In effect, provided a woman can find a physician willing to perform an abortion, she has a constitutional right to obtain one at any time throughout the nine months of pregnancy, right up to birth.

When the Court finished its recitation of the history of the case and disposed of the procedural questions of justiciability, standing and abstention, it did not approach the substantive issues first. Instead, the Court initiated a lengthy examination of the history of legal and societal attitudes toward abortion. Nearly twice as many pages were devoted to this effort as were to be spent on analysis of the legal issues.

The Court opined that because abortion was fairly freely available and not forbidden by the law until the mid-19th century, it should be recognized as a facet of the liberty the framers of the Fourteenth Amendment intended to protect. This historical discussion, then, must be seen as the foundation for the Court's

2. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 921 n.19 (emphasis in original) (1973).

holding that the right of privacy found in the U.S. Constitution should encompass abortion.[3]

The Court's recounting of the history of abortion began with ancient attitudes and the Hippocratic Oath. Relying for both sections on the outdated work (1943) and strong views of historian Ludwig Edelstein, the Court surmised that the ancient Greeks and Romans had resorted to abortion with great frequency and that it had met with widespread approval. *Roe*, 410 U.S. at 130. Comprehensive new evidence assembled by the Italian historian Enzo Nardi published in 1971, reveals that temple inscriptions and other ancient writings disclose considerable opposition to abortion in the Greco-Roman world.[4] This evidence has considerable support from other commentators. A comprehensive survey by Stephen Krason and William Hollberg[5] casts skepticism on the Court's interpretation of Plato and Aristotle as unqualifiedly "commending" abortion, cites a number of

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3. Some have found even the Court's version of abortion history to point in the opposite direction from that holding. "The Court . . . seemed to ignore 'the "traditions and collective conscience of our people," ' " wrote one commentator. "[T]he Court's holding was decidedly more lenient than the American attitudes indicated by the legislative trends and professional opinions discussed in the course of its opinion." Comment, *Roe v. Wade and In Re Quinlan: Invididual Decisions and the Scope of Privacy's Constitutional Guarantees*, 12 U.S.F.L. Rev. 111, 142 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 [1965], quoting *Powell v. Alabama*, 287 U.S. 45, 67 [1932]). See also Regan, *Rewriting Roe v. Wade*, 77 U. Mich. L. Rev. 1569, 1621 (1979), ("[T]he Court has rarely overturned as much history all at once as it did in *Roe v. Wade*. That surely ought to give us pause.").

4. Nardi, *Procurato Aborto Neo Mondo Greco Romano*, (1971).

5. S. Krasson & W. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted*, 4-7 (1984). But see Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L.J. 67, 77.

prominent Greeks and Romans who condemned abortion,[6] and points out that according to a text ascribed to Galen, Sparta under Lycurgus and Athens under Solon prohibited abortion.[7] Harold Brown and Krason and Hollberg observe that Roman law banned abortion beginning with the reign of the Emperor Augustus.[8]

Except for their observation that the Persian Empire banned abortion, the Court's survey of the ancient world was limited to Greece and Rome. *Roe*, 410 U.S. at 130. Yet surely it is noteworthy that abortion was condemned by the twelfth century B.C.E. (Before Common Era) Assyrians,[9] by the Hitrites,[10] by the early Hindus[11] and Buddhists of India and by Indian law. There is some indication that the ancient Egyptians held similar views.[12] Most of these facts were available to the *Roe* Court in the epical work of Eugene Quay.[13] The Court knew of Quay, for the opinion cited

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6. Krasson & Hollberg, *supra*, note 5, at 4, 8. See also Special Project, *supra* note 7, at 81-82.

7. *Id.* at 8, following Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, Hum. L. Rev., Spring 1975, at 5, 11.

8. Brown, *supra*, note 7, at 14: Krasson and Hollberg, *supra*, note 5, at 8.

9. Brown, *supra*, note 7 at 7: Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5, at 75.

10. Brown, *supra*, note 7, at 8; Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5, at 74 and n. 6.

11. Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5 at 74 and n. 8.

12. *Id.*; Special Project, *supra*, note 5, at 73-74 and nn. 3-4.

13. Quay, *Justifiable Abortion - Medical and Legal Foundation* (Pt. 2), 49 Geo. L.J. 395 (1961).

him, *Roe*, 410 U.S. 130, n.9., but the Court incorporated none of this historical evidence into its opinion.

The Court itself recognized that the Oath of Hippocrates, composed in ancient Greece, prohibited members of what would become the medical profession to practice abortion. This Hippocratic Oath, until recently, was recited by the graduates of nearly every medical school as they formally became physicians. The Court raised this matter *sua sponte,* because, it wrote, "Although the Oath is not mentioned in any of the principal briefs in this case or in [the companion case of] *Doe v. Bolton* . . . , it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Roe*, 410 U.S. at 131.

The Court did not fill in the gap between ancient attitudes and the Hippocratic Oath up to the Anglo-American common law. During this period, the ethics and law of Western civilization were dominated by the Judeo-Christian perspective, both of which had long opposed abortion, with minor exceptions. The first century C.E. (Common Era) Didache, known as the "Teaching of the Twelve Apostles," proclaimed to the early Christian Church, "You shall not slay the child by abortions. You shall not kill what is generated."[14] Similar declarations were made in other early Christian writings, such as the Epistle of Barnabus and the Apocalypse of Peter.[15] In the West, the Fathers of the Church, from second century Clement of Alexandria, through Tertullian and Jerome to Augustine, denounced abortion.[16] In the East, St. John Chrysostom and St. Basil of Cappadocia spoke out against

14. J. Noonan, *An Almost Absolute Value in History*, in *The Morality of Abortion: Legal and Historical Perspective* 1, 9 (J. Noonan ed. 1970).

15. *Id.* at 10.

16. *Id.* at 11-16.

abortion.[17] These early teachings were finalized in the prohibitions of penitentials and of canons enacted by synods and councils, which in turn surfaced into the law of the state, such as the Frankish kingdom of Charlemagne.[18] A canon law decretal of Gregory IX coupled the penalty for abortion with that for means of sterilization: of both it was said, "[L]et it be held as homicide."[19] This treatment of abortion, together with contraception, as crimes demanding severe punishment was combined with a general view that abortion, although punished as such, was not "true" homicide until the fetus was "ensouled," which was believed to occur at formation or quickening.[20] That distinction, taken from Aristotle, was introduced by theologians in the fifth century,[21] and was the prevailing view until the seventeenth century. Aristotle's theory, which came to be called "delayed animation," was essentially one of biological metamorphasis.

In the early 13th century, Henry De Bracton wrote that abortion by blow or poison was homicide if the fetus was "already formed and animated, and particularly if it be animated."[22] Another authority later in that century, Fleta, also condemned

17. *Id.* at 17.

18. *Id.* at 18.

19. *Decretals* 5.12.5, quoted in Noonan, *supra*, note 14, at 21.

20. For a careful and comprehensive history of the attitude of medieval Christendom toward abortion, see J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977).

21. Special Project, *supra*, note 5, at 84.

22. 2 H. Bracton, *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879).

abortion of a "formed and animated" fetus as homicide.[23] At that time, biologists taught that a new life came into being when the fetus assumed recognizable human form, which was thought to occur forty days after conception.[24]

The impossibility of proving the cause of the unborn child's death was a difficulty encountered with the common law crime of abortion. This evidentiary problem led to a paucity of indictments for abortion. As a result, some sixteenth century writers concluded that, as a practical matter, abortion was not a crime.[25] Seventeenth century abortion reformers tried to resolve the proof problem by declaring that an abortion was murder if the child was born alive with marks of the abortion and then died. If the child was stillborn, there was no murder because it could not be known "whether the child was living at the time of the batterie or not, or if the batterie was the cause of the death . . .*R. v. Sims,* 75 Eng.Rep.1075 (K.B.1601). Chief Justice Sir Edward Coke, the great sixteenth and seventeenth century jurist who successfully fought to capture for common law courts most of the jurisdiction of ecclesiastical courts, attempted, later in the 17th century, to resolve the problem further, and, in so doing, indicated once again the concern common law attached to the life of the fetus:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body,

23. See Quay, *supra*, note 13, 431.

24. See Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1644-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 411-12 (1968).

25. See Davies, *Child Killing in English Law*, 1 Modern L. Rev. 203 (1937).

> and she is delivered of a dead childe this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in *rerum nature,* when it is born alive.[26]

In *Roe*, the Court, relying on Professor Means' interpretation of two cases from 1327 and 1348 (three centuries before Coke's writings), suggested that Coke was either mistaken or intentionally misstated the status of abortion as a common law crime. *Roe*, 410 U.S. at 134. Other commentators, such as Robert Byrn[27], Joseph Dellapenna[28] and Robert Destro[29], strongly dispute Means' analysis of those cases and suggest that the cases stand for the opposite conclusion. The great common law scholars clearly indicated that abortion was a crime with respect, at the very least, to a quick fetus.

Finally, as Blackstone indicated, the common law recognized the life of the fetus at the time of quickening. Yet Means, and consequently, the *Roe* Court, dismissed Blackstone, whose name was synonymous with "law" for eighteenth and nineteenth century American lawyers, as an uncritical follower of Coke. Blackstone's work, which must have been familiar to framers both of the

26. E. Coke, *Institutes III**50 (1644).

27. Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807, 815-27 (1973).

28. Joseph Dellapenna, *The History of Abortion: Technology, Morality, and the Law*, 40 U. Pitt. L. Rev. 359 (1979).

29. Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975).

Constitution and of the Fourteenth Amendment, called it a "great misprision" "[t]o kill a child in its mother's womb."[30]

From treatment of the common law, the *Roe* Court moved to a description of the nineteenth-century statutory enactments on abortion, both in England and in the United States.

The first English abortion statute, recognizing this understanding of human generation, provided for greater penalties for an abortion of a woman "quick with child" than a woman "not being, or not being proved to be, quick with child."[31] These provisions were superseded in a new statute, enacted in 1837, which imposed a penalty for all abortion acts without distinction.[32] A possible motive for this change was the discovery of the ovum, and thus a more accurate idea of the nature of conception, in 1827.

The abortion law in effect in this country, in most states, until the mid-19th century, was derived from English common law. *Roe*, 410 U.S. at 138. While the vast majority of states retained the common law distinction that abortion before quickening was not a crime, no state recognized non-criminal abortion after quickening.[33] Later in the 19th century, several states interpreted the common law to mean that abortion was a crime if it occurred at any time during pregnancy, e.g., *Mills v. Commonwealth*, 13 Pa. 630 (1850).

30. 4 W. Blackstone, *Commentaries* *198.

31. 43 Geo. 3, c. 58, Section 2 (1803).

32. 7 Will. 4 & 1 Vict., c. 85 (1837).

33. Byrn, *supra*, note 27.

Almost all of the states enacted abortion statutes during the 19th century.[34] Connecticut adopted the first state abortion statute in 1821.[35] The Connecticut statute retained the quickening distinction for the abortion crime. Quickening, however, soon began to disappear as the practical standard to determine criminality. The intention behind enactment of these statutes is illustrated by the Maine Supreme Court which, in interpreting the Maine statute, abrogated the quickening requirement in the abortion crime. The court pointed out that if the pleading did not allege the destruction of the child, it would be fatally defective for not charging the essential element of the crime. *State v. Smith*, 33 Me.48 (1851).

The *Roe* Court insisted that when the application of criminal law was statutorily pushed back to the moment of conception in the nineteenth century, it was done not to protect prenatal life but to protect maternal health against the danger of unsafe operations. *Roe*, 410 U.S. at 151-152. In doing so, it completely failed to mention the important scientific developments that promoted the statutory changes. Although sperm was discovered in 1677, the mammalian egg was not identified until 1827. During the next several decades, the cell was recognized as the structural unit of living organisms and the egg, along with sperm, was determined to be cells. It was these breakthroughs in biological research that persuaded the medical community, and the lawmakers and public who relied on their findings, that the human

34. See *Roe v. Wade*, 410 U.S. 113, 175-76, nn. 1 and 2 (1973) (J. Rehnquist dissenting).

35. Conn. Stat. Tit. 20, Section 14 (1821).

development concepts embodied in their laws were outmoded and hence, in need of major revisions.[36]

About 1857, a "physicians' crusade" was led by the American Medical Association to enact laws protecting the unborn from the moment of conception.[37] In 1859, the American Medical Association Committee on Criminal Abortion criticized the quickening distinction in criminal abortion laws for the "grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being," and called upon state legislatures to revise their abortion laws.[38] The AMA position was not unnoticed because during this period many states abolished the requirement that an abortion had to follow quickening to be a crime. At the time of the ratification of the Fourteenth Amendment in 1868, at least 28 of the 37 states had made abortions before quickening a crime.[39] In the next 15 years, seven more of these States criminalized pre-quickening abortional acts.

The *Roe* Court omitted these developments — an extraordinary exclusion in light of its quotation, in *Roe*, of

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36. The Human Life Bill: Hearing on S. 158 Befoe the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 474 (comm. print 1981) (statement of Victor Rosenblum, Professor of Law, Northwestern Univ): see also Dellapenna, *supra*, note 28, 402-404.

37. J. Mohr, *Abortion in American, The Origins and Evolution of National Policy, 1800-1900*, at 200 (1978).

38. 12 *Transactions of the Am. Med. Assn.* 73-78 (1859).

39. Quay, *supra*, note 13 at 447-520. See *Gray v. State*, 77 Tex. Cr. R. 221, 224, 178 S.W. 337, (1915) (construing abortion statute to abrogate the common-law quickening distinction).

statements from the principal resolutions of the AMA during the "physicians' crusade." *Roe*, 410 U.S. at 141-42.

Further evidence that at least one motivation behind these laws was the protection of the life of the fetus, is seen in several court decisions interpreting these statutes. For instance, an Oklahoma case held that its anti-abortion statutes were enacted and designed for the protection of the unborn child and through it, society. *Bowlan v. Lunsford*, 76 Okla. 115 (1936).

Between 1967 and 1972, most of the state legislatures considered revising their abortion laws. Nineteen states made changes in their abortion laws to permit abortion in an effort to prevent serious health damage to the mother.[40] In addition, some of the states permitted abortion when the unborn child was conceived as a result of rape or incest, or where the child would be born with substantial deformity. Four states required no grounds at all. But all states limited abortions in terms of age of the fetus. For example, Washington had a limit of four lunar months.

The other thirty-one states did not change their abortion law, despite the fact that abortion legislation was introduced in most of them. In two states, Michigan and North Dakota, proposed liberalized abortion statutes were rejected by referendum — by majorities of 61% and 77%, respectively. In twenty-one of the states, the abortion statutes in effect in 1868 (the year the Fourteenth Amendment was ratified) were still effective at the time of the *Roe* decision. *Roe* 410 U.S. at 176, note 2 (dissenting opinion).

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40. Knecht, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems.* 1972 U. of Ill. L.F. 177.

In sum, no state, including the four states which allowed abortion-on-demand, made abortion legal for the entire nine months. None of the states had abortion laws as expansive as that created by the Court in *Roe v. Wade*.

The amici respectfully submit that the protection of human life is the foremost duty of government. The Declaration of Independence asserts that all men are endowed with an inalienat le right to life, and that it is in order to secure this right that governments are instituted among men. This principle is epitomized in the words of a Founding Father, Thomas Jefferson, who exhorted that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government".[41] Honoring this commitment, the Constitution provides in both the Fifth and Fourteenth Amendments that no person may be deprived of life without due process of law.

This Court, through its duty to interpret the law, should uphold this commitment to protect human life.

II.

THE FRAMERS OF THE CONSTITUTION AND OF THE FOURTEENTH AMENDMENT DID NOT INTEND TO CREATE A RIGHT TO ABORTION.

There is no ascertainable support in the legislative history of the Constitution to warrant the conclusion that it was intended to secure a "right to an abortion."[42] The Court's discussion of

41. Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809), reprinted in J. Bartlett, *Familiar Quotations*, 472-73 (14th ed. 1968).

42. Ely, *supra*, note 2, at 939.

the history of abortion regulation, *Roe*, 410 U.S. 113, 129-152, likewise offers no support for the finding within the Fourteenth Amendment of a right to abortion. Nevertheless, *Roe* declares that the Due Process Clause of the Fourteenth Amendment confers a right of privacy which includes the right of a woman to abort her offspring if she so chooses. The decision does not contain a comprehensive discussion of abortion and its relation to the right to privacy. Despite its confidence that somewhere in the Constitution there is a right to abortion, the Court is unwilling or unable to determine the boundaries of the privacy right, saying only that the Constitution does not confer "an un limited right to do with one's body as one pleases." *Roe*, 410 U.S. at 153. Yet if the right of privacy does not entitle one to do with one's own body what one pleases, how can it be extended to protect activity that terminates the life of what would certainly be another human being?

In the absence of an elaboration, it can be concluded that the Court felt that the *Roe* holding is sufficiently supported by the detriment imposed upon the pregnant woman by statutes which prohibit her from aborting her child. While the gravity of this detriment should be appropriately weighed, the Court obviously believes that other important factors, such as spousal consent, are not relevant. Even though the Court, in *Roe*, acknowledged that there is no unrestricted "right to privacy," *Roe* places no effective restrictions on a woman's right or ability to obtain an abortion under the privacy right. All this, however, has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.[43] Whatever one's viewpoint is on the abortion issue, it is generally agreed that the Constitution does not provide such an unrestrictive "right to privacy."[44]

43. *Id.*, at 932.

44. *Id.*

III.

THERE IS NO BASIS FOR THE SUPREME COURT'S CONCLUSION IN *ROE* THAT PRENATAL LIFE IS BEYOND THE POWER OF THE STATE TO PROTECT.

The discussions in *Roe v. Wade* of the physiological and legal status of the fetus is the most crucial part of the opinion. The question of when life begins, the Court says, is beyond the competence of the judiciary to answer. *Roe,* 410 U.S. at 159. Nevertheless, the Court effectively answers that question for the legislatures and citizens of fifty states, declaring that the States may only protect unborn life after "viability." Therefore, human life, in the sense of an individual whose rights may be protected by the community, does not begin until at least the seventh month of pregnancy. Indeed, all existence prior to live birth is here given the status of, at most, "potential" life. *Doe v. Bolton* held that the "potential" life of even a viable unborn child cannot be regarded as comparable, under the law, to the emotional or social "health" of his or her mother. *Doe,* 410 U.S. at 192.

The Court offers two reasons for its deduction "that the word 'person' as used in the Fourteenth Amendment does not include the unborn": (1) that uses of "person" elsewhere in the Constitution do not have a prenatal application; *Roe*, 410 U.S. at 157, and (2) that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158.

The first reason is unpersuasive because in none of the clauses cited by the Court does the Constitution attempt to define what a "person" is. These provisions, which include the eligibility requirements for Federal office, the apportionment of representatives, the Extradition and Fugitive Slave Clauses of Article IV, act only to restrict a broad class of persons for

particular purposes. This is exemplified by the requirement that a person must be 25 to be a Representative, 30 to be a Senator and 35 to be President. These clauses, as Professor John D. Gorby of the John Marshall School of Law has explained, suggests "only that there are persons, 24 years of age and younger, who are not qualified for the House, Senate or Presidency."[45] They do not imply that those less than 24 years of age are non-persons, nor do they suggest when 24 year-olds become persons, or that they have become persons at birth or at any other particular stage of their development. The Court's essay on this subject offers little convincing proof to support its conclusion that "person" in the Fourteenth Amendment applies only post-natally.

The Court indicates that no case has specifically held the unborn to be persons under the Fourteenth Amendment. *Roe*, 410 U.S. at 158. Yet the Justices should have been aware that the question of the constitutional status of the unborn was before the Supreme Court for the first time. Thus, the Court was able to avoid addressing the issue of fetal personhood by citing a lack of controlling precedent. The failure to address the question more fully is difficult to understand if, as the Court opined, the appellant's case would collapse if the unborn were held to be persons.

Finally, there is ample reason to believe that the Court's belief in the relative availability of legal abortion during the 19th century is factually inaccurate. Leading authorities are in agreement that it was a common law crime to administer any drug or perform any operation for the purpose of causing a miscarriage, unless

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45. See Gorby, *The 'Right' To An Abortion, The Scope of the Fourteenth Amendment 'Personhood', and the Supreme Court's Birth Requirement,* 1979 So. Ill. L. Rev. 1, 11-12.

such operation were necessary to save the life of the woman.[46] During the 19th century, Americans gradually codified and strengthened the common law prohibition of abortion,[47] and as Justice Rehnquist noted in his dissenting opinion, at the time of the adoption of the Fourteenth Amendment in 1868, "there were at least 36 laws enacted by state or territorial legislatures limiting abortion." *Roe*, 410 U.S. at 174-176. At least 19 of these had been passed by 1850. Nevertheless, the Court "observ[ed] . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158.

The Court's holding that the Fourteenth Amendment could not possibly have been intended to protect the unborn may conflict with the plain meaning of the word "person," and quite possibly, with the intent of the Fourteenth Amendment. In order to decide whether an individual is protected under the Fourteenth Amendment, Congressman John Bingham of Ohio, its principal Framer, declared in 1867, "the only question to be asked of the creature claiming its protection is this: Is he a man?"[48] The Court's observations notwithstanding, this question has consistently been answered in the affirmative by American courts and legislatures with regard to the unborn.[49]

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46. R. Perkins, *Criminal Law* 140 (2nd ed., 1969) See generally, Horan et. al, *The Legal Case for the Unborn Child*, in *Abortion and Social Justice*, 105 (1972).

47. Destro, *supra*, note 29, 1278-80.

48. Cong. Globe, 40th Cong., 1st Sess. 542 (1867).

49. In 1850, the Supreme Court of Pennsylvania declared, "By the well settled and established doctrine of the common law, the civil rights of an infant en ventre sa mere are fully protected at all periods after conception." *Mills v. Commonwealth*, 13 Pa. 630, 631 (1850). See also *State v. Murphy*, 27 N.J.L. 112, 114 (1858) (the mother's offense in procuring an abortion "at the common is against the life of the child"); *Smith v. State*, 33 Me. 46 (1851).

Thus, the Court's finding of non-personhood of the unborn was a fleeting one. In any event, this finding does not mandate the Court's conclusion that the States lack any compelling interest in protecting the lives of these unborn.

The theme of "personhood" was further discussed by the Court in its observation that the unborn were not considered "persons in the whole sense" under the common law. *Roe*, 410 U.S. at 162. This observation is as tenuous as the Court's denial of personhood under the Constitution. The Court did not take note of the history of abortion restrictions in perspective—with abortion first as a violation of canon and common law, then, after the demise of canon law jurisdiction over civil matters, as a common law crime, and as a statutory offense.

The phrase, "persons in the whole sense," is not inclusive. Many categories of human beings were not given full rights under the common law—for example, infants, women and slaves. Yet it does not follow that the common law did not protect the lives of these human beings. At common law, the unborn were the beneficiaries of personhood rights in some circumstances. For example, the Court acknowledged that unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians.[50]

In the realm of tort law, the uninterrupted trend of recent decades has been to discard the old rules and to allow the unborn child standing to sue for injuries sustained in utero. Dean Prosser has noted that,

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50. O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 Sup. Ct. Rev. 337, 355. See e.g. *Byrn v. New York City Health and Hospital Corp.*, 31 N.Y. 2d 194, 286 N.E. 2d 288, (1972).

> All writers who have discussed the problem have joined in condemning the old rule, and in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother.[51]

Thus, in terms of the law's development, the Court would have placed itself well within the mainstream by recognizing, under some circumstances, that the unborn have some type of "personhood" status. Instead, it did not even acknowledge this trend.

It is important to distinguish between *Roe v. Wade's* holding regarding the personhood of the unborn under the Fourteenth Amendment and the Court's subsequent discussion of theories on when life begins. On the first question, the Court squarely held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe*, 410 U.S. at 158. This conclusion disposed of any argument that the State might be permitted or obligated under the Amendment to protect the life of the unborn.

The second argument proposed by the State defendants in *Roe v. Wade* was that, apart from any duty under the Fourteenth Amendment, the State has a compelling interest in protecting life "from and after conception." *Roe*, 410 U.S. at 159. The Court's response was philosophical:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus the judiciary, at this point in the development of man's

51. W. Prosser, *The Law of Torts*, 336 (4th ed. 1971)

> knowledge, is not in a position to speculate as the the answer. *Id.*

After *Roe*, only one theory of prenatal life is reflected in American constitutional law: that life is worth protecting only after viability, when the fetus "has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. It is only at this point, fixed elsewhere in the opinion at about 24-28 weeks, *Id.* at 160, that a State may even begin to balance its interest in the life of the fetus against the social or emotional "well being" of the mother. This conclusion rests upon the Court's determination that until birth, "the fetus, at most, represents only the potentiality of life." *Id.* at 162. No other "theory of life," the Court holds, may be adopted by the States to limit the right to abortion. *Id.*

The Court examines the various historical views of when human life begins, and notes that many of these disagreed with the view that life begins at conception. *Roe,* at 160. In effect, the Court decided that the State may only enforce a theory of life that is consistent with the view that life begins at viability. The Court's determination, for purposes of the law, of when life begins and its division of the same in three fetal stages represents an arbitrary solution to implement a compromise to an uncompromisable situation. Again, regardless of one's views on the abortion issue, the Court's review of *Roe* cannot be characterized as mere interpretation of the Constitutional text.

IV.

THE SUPREME COURT, IN *ROE V. WADE*, EXCEEDED ITS SCOPE OF AUTHORITY WHEN IT CREATED A CONSTITUTIONAL RIGHT TO ABORTION.

There has been a great deal of jurisprudential criticism directed at the *Roe* and *Doe* decisions. Most of this criticism has

come from legal scholars who do not look with disfavor upon the substantive policies generated by these decisions. The question is how these results could emanate from and be mandated by a Constitution that had never been thought prior to 1973, to contain the "rights" set forth in *Roe* and *Doe*.

Among constitutional scholars who have been sharply critical of the jurisprudence in *Roe* are the late Alexander Bickel of the Yale Law School, Arthur Miller of the Harvard Law School, Harry Wellington, former Dean of the Yale Law School and Archibald Cox, former Solicitor General of the United States.[52]

Roe, like other controvertible Supreme Court decisions, reflects the anomaly of the American legal system. In an effort to account for some flexibility, the Court allowed for scientific advances so that later decisions could be adjusted accordingly. In spite of the plethora of medical and biological achievements in the twelve and a half years since *Roe*, the Court has not substantively altered its original holding. Nevertheless, the Court's decision can only be modified by self-initiative or by the long and arduous process of constitutional amendment. Consequently, *Roe* has attained a degree of permanency possibly not even envisioned by its authors.

The Court's division of the human gestational period into three trimesters is representative of *Roe's* arbitrary solution to the abortion rights question. The Court never substantiates its perceived need to dissect the State's interest to correspond with its three trimester formula. Despite the appearance of what some argue is an equitable balancing of rights and interests, the practical

52. A. Bickel, *The Morality of Consent* (1975); A. Miller, *Miller's Court* (1982); Wellington, *Common Law Rules and Constitutional Double Standards*, 83 Yale L.J. 221, 303 (1973); A. Cox, *The Role of the Supreme Court in American Government* (1976).

result yields a nullity for an effective State interest. The Court ensured that most abortions could and would occur well before any meaningful application of State power. Certainly, even under the most liberal construction of jurisprudence, this amounts to a *non sequitur*.

CONCLUSION

"Stare decisis et non quieta movere" — "to stand by what has been decided and not disturb what is at rest."[53]

This doctrine of *stare decisis* favors reliance on precedent and discourages overruling cases. However, incorrectly-decided constitutional questions are never quiet nor at rest. The landmark cases[54] which have been overturned were done so because their legal foundations were infirm. The Court has shown, in its jurisprudential wisdom, its willingness to reconsider the merits of earlier decisions based on new findings and unintended consequences of the original case.

Roe v. Wade is one such case ripe for reevaluation. Additional information is now available to the Court, not only through significant technological advances, but there is no evidence or indication that the *Roe* Court foresaw the occurrence of abortion on such a massive scale. This Court should not stand by what has been decided, for it was not correctly decided by jurisprudential standards, and as the issues in the matters subjudice indicate, there has been no rest for the *Roe* decision.

53. See McKay, *Stability and Change in Constitutional Law*, 17 Vand. L. Rev. 203, 213 (1963). McKay renders "*quieta*" as "what is established." "What is at rest" seems to be more accurate.

54. For example, see *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905).

Wherefore, the amici curiae pray that this Court reverses the Third Circuit Court of Appeals and reevaluates its original findings in *Roe*, for the reasons stated herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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v.

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EUGENE F. DIAMOND, ET AL., APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE UNITED STATES

These cases involve the efforts of two state legislatures to balance the competing interests at stake in the abortion decision. Congress has in the past enacted legislation affecting that decision (see 42 U.S.C. 300a-6; Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926), and may do so again. This Court's continuing effort to define the perimeters of permissible abortion regulation has a direct impact upon the ability of the country's elected representatives—both state and federal—to deal with this important question of great public import and heated political debate.

SUMMARY OF ARGUMENT

The opinions of the courts below are multiply flawed. In their manifest eagerness to strike down the state statutes in question they transgress numerous canons of constitutional adjudication: provisions are construed so as to impugn rather than save their constitutionality; facts stipulated solely for purposes of a preliminary injunction are taken as dispositive for an ultimate judgment on the statute; and provisions repealed and substantially recast to meet constitutional objections are struck down in their earlier versions. More substantively, the courts below reach their conclusions as if this Court in *Roe* v. *Wade* had posited only one value, a woman's unfettered right to an abortion, rather than a balance of values which include the state's interest in maternal health and in unborn and future life. The harsh and one-sided nature of the decisions below may in part be a response to a change in emphasis in this Court's opinion in *Akron* v. *Akron Center for Reproductive Health*, which itself expressed considerable impatience with legislative attempts to balance the interests recognized in *Roe* v. *Wade*. To the extent this is so, these cases and *Akron* itself are not just wrong turns on a generally propitious journey but indications of an erroneous point of departure. Indeed, the textual, doctrinal and historical basis for *Roe* v. *Wade* is so far flawed and, as these cases illustrate, is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it.

DISCUSSION

A. In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court held that the "right of privacy" emanating from the Due Process Clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." But the Court has consistently rejected the notion that "the Constitution requires abortions on demand" (*id.* at 208 (Burger, C.J., concurring)). Rather, the Court has held, in this and other contexts, that the right of privacy "is not unqualified and must be considered against important state interests in regulation" (*id.* at 154).

Perhaps the dominant governmental interest recognized in the Court's opinions is the state's "unquestionably strong and legitimate interest in encouraging normal childbirth," an interest that "exist[s] throughout the course of the woman's pregnancy" (*Beal* v. *Doe*, 432 U.S. 438, 446 (1977)). And the Court has consistently recognized that the state has "an important and legitimate interest," which likewise exists throughout pregnancy, in safeguarding the health of the mother and in maintaining medical standards. *E.g.*, *Roe* v. *Wade*, 410 U.S. at 154; *Doe* v. *Bolton*, 410 U.S. 179, 194-195 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 80-81 (1976).

In evaluating state efforts to further these legitimate interests, this Court and its individual Justices have said that a regulation "is not unconstitutional unless it unduly burdens the right to seek an abortion." *E.g.*, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977) (original quotation marks omitted). Indeed, the Chief Justice has stated his understanding that "[t]he Court's holdings in *Roe* v. *Wade* * * * and *Doe* v. *Bolton* * * * simply require that a State not create an absolute barrier to a woman's decision to have an abortion" (*Maher* v. *Roe*, 432 U.S. at 481 (Burger, C.J., concurring)).

The decisions below are inconsistent with these principles and should be reversed. The courts of appeals betrayed unabashed hostility to state regulation of abortion and ill-disguised suspicion of state legislators' motives. The courts repeatedly failed "to give proper weight to the legislative decision, as expressed in the statute, to protect the life and health of the woman and the child subject to abortion" (84-495 J.S. App. 170a (Weis, J.)). A persistent theme of the decisions below is "the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion" (*Danforth*, 428 U.S. at 98 (White, J., concurring and dissenting)). The decisions below thus not only "have far-reaching effects"

on the abortion issue, but also "implicate the proper role of the states and the federal courts" under our Constitution (84-495 J.S. App. 172a-173a (Weis, J.)).

1. *No. 84-495.* The Third Circuit signaled its antipathy in the opening section of its opinion, in which it imputed to the Pennsylvania legislature "a pervasive invalid intent" to "restrict a pregnant woman's fundamental right to choose an abortion" (84-495 J.S. App. 31a, 32a). The court suggested that the legislature was somehow culpable for enacting "a complex and extensive regulatory scheme * * * containing numerous provisions which it had been advised skirted constitutional limits" (*id.* at 86a). The court faulted the legislature for passing the abortion bill "after scant debate" (*id.* at 13a) and for attaching it to another bill the court did not view as "germane" (*id.* at 12a & n.3). The court relied heavily (*id.* at 12a-13a) on newspaper accounts about a co-sponsor's alleged opposition to *Roe* v. *Wade*. And even though the case was on appeal from the district court's denial of a preliminary injunction,[1] the court of appeals reached out to render a final judgment holding most of the statute unconstitutional, asserting that "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review" (84-495 J.S. App. 21a).

The court's zeal to place the worst possible construction upon the Pennsylvania statute is evident from its treatment of the specific provisions challenged. That treatment is seriously at odds with this Court's abortion opinions and with basic principles of judicial review.

a. Section 3206(c) provides that a pregnant minor, without seeking parental consent, may petition the appropriate court to authorize an abortion upon a finding that she "is mature and capable of giving informed consent * * * and has, in fact, given such consent" (18 Pa. Cons. Stat. Ann. (Purdon 1983)). This provision codifies the holding in *Bellotti* v. *Baird* (*Bellotti II*), 443

[1] The district court had granted a preliminary injunction as to one section of the statute, but the State conceded the invalidity of that section on appeal (84-495 J.S. App. 18a, 33a-34a).

U.S. 622, 648-651 (1979). The statute provides that such court proceedings "shall be confidential and shall be given such precedence * * * as will ensure that the court may reach a decision promptly and without delay" (§ 3206(f)). The judge must rule "within three business days of the date of application" (*ibid.*). The statute mandates an "expedited confidential appeal" if authorization is denied and directs the Pennsylvania Supreme Court to issue "such rules as may be necessary to * * * ensure confidentiality and * * * promptness of disposition" (§ 3206(h)).

The court of appeals "d[id] not invalidate section 3206" (84-495 J.S. App. 56a). The court nevertheless proceeded to enjoin the statute's enforcement "until the state promulgates [the] regulations" referred to above (*ibid.*). This Court has made it clear, however, that a state is not constitutionally required to have regulations on this subject, expressing confidence that state courts will expedite cases involving minors' consent consistently with this Court's decisions. *Bellotti II*, 443 U.S. at 645 & n.25. Accord, *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983). The court of appeals' action in enjoining enforcement of a state law, without any finding that it contravenes federal law or the federal Constitution, is unprecedented and remarkable.

b. Section 3210(c) requires the attendance of a second physician at abortions performed after viability. This provision, like the provision at issue in *Ashcroft*, contains no explicit exception for medical emergencies (see 462 U.S. at 485 & n.8). The Court in *Ashcroft* inferred such an exception under the latter statute and held it valid (*ibid.*). The court of appeals refused to infer a comparable exception under Section 3210(c) here. It did so even though Section 3210(a) provides a "complete defense to any charge brought against a physician for violating the requirements *of this section* * * * that the abortion *was necessary to preserve maternal life or health*" (emphasis added). The court justified its holding by asserting that subsections (a) and (c) are "separated by [an] intervening provision [viz., subsection (b)]

which on its face evinces the Pennsylvania legislature's unconstitutionally restrictive view of maternal health" (84-495 J.S. App. 73a). The court's insistence that the statute be construed so as to create rather than to remove constitutional problems inverts well-established canons of judicial review.

c. Section 3210(b) provides that the method of abortion used when the fetus is viable must be the one most likely to produce a live birth, unless that method would cause a "significantly greater" risk to the mother. The district court, in an effort to discharge its "oblig[ation] to give the statute [a] reasonable interpretation which avoids the danger of constitutional invalidity" (84-495 J.S. App. 247a-248a), interpreted "significantly greater" to mean "medically cognizable," and held the statute as thus interpreted valid under *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979). The court of appeals refused to adopt this construction, finding it "inconsistent with * * * the legislative intent," and accordingly declared the statute unconstitutional (84-495 J.S. App. 70a). It did so even though the district court had shown that its saving construction was supported by a dictionary definition of the relevant words (*id.* at 248a). And it did so without even considering the possibility of abstaining to ascertain whether the Pennsylvania courts might adopt the same construction that the district court did.

d. Section 3208, entitled "Printed Information," directs the Pennsylvania Department of Public Health to publish easily comprehensible pamphlets describing assistance available to pregnant women through public and private agencies. These pamphlets are to include the following statement: "The Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion" (§ 3208(a)(1)). The statute also directs the Department to publish literature discussing the unborn child's probable anatomical characteristics and possibility of survival, provided that such material is "objective, nonjudgmental and designed to convey only accurate scientific information" (§ 3208(a)(2)).

The court of appeals declared this statute unconstitutional (84-495 J.S. App. 58a-59a). It did not base this holding on a determination that the section, standing alone, was invalid. Indeed, such a determination would contravene this Court's ruling that a state may "make a value judgment favoring childbirth over abortion, and * * * implement that judgment by the allocation of public funds" (*Maher* v. *Roe*, 432 U.S. at 474). The court of appeals based its holding, rather, on a determination that Section 3208 was "inextricably intertwined" (84-495 J.S. App. 58a) with another section which the court thought unconstitutional. The sole link between the two sections is a statutory cross-reference (see *id.* at 137a (Seitz, C.J., dissenting)). The court invalidated Section 3208 based on this supposed "inextricable" connection even though the law contains an explicit severability clause (*ibid.*). The court's approach is unjustifiable and can only be explained as an attempt to censor printed matter the majority did not like.

e. Section 3205, entitled "Informed Consent," provides that a woman's consent to abortion will be deemed "voluntary and informed" only if the referring or the attending physician provides her with information about the relative medical risks, both physical and psychological, of abortion and childbirth. The doctor or his agent must also inform the woman of the availability of certain financial assistance and social services in the event of childbirth (§ 3205(a)(2)(i) and (ii)). Finally, the doctor or his agent must inform the woman that she has a right to review, but need not review, the printed materials described above (§ 3205(a)(2)(iii), cross-referring to § 3208).

The court of appeals held this statute unconstitutional, citing *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The court of appeals inferred that " 'much of the information required * * * is designed not to inform the woman's consent but rather to persuade her to withhold it altogether' " (84-495 J.S. App. 48a (quoting 462 U.S. at 444)). And the court viewed the statute as mandating "a litany of information" that in-

trudes upon the attending physician's discretion (84-495 J.S. App. 48a-49a (quoting 462 U.S. at 444-445)).

The court of appeals plainly erred. Most of the information Pennsylvania requires is identical to that which the Court in *Akron* deemed "certainly * * * not objectionable," "probably * * * routinely made available to the patient," and "clearly * * * related to maternal health and to the State's legitimate purpose in requiring informed consent" (462 U.S. at 445-446 & n.37). It is true that Pennsylvania requires the doctor himself to provide the relevant medical information, permitting him to delegate to an assistant the provision of information about social services, financial assistance, and the like. Cf. *Akron*, 462 U.S. at 448-449 (holding that the physician generally must be allowed to "delegate[] the counselling task to another qualified individual"). But the division of labor Pennsylvania has adopted is surely a rational one, particularly in light of this Court's repeated stress on "the central role of the physician * * * in consulting with the woman about whether or not to have an abortion" (*Colautti*, 439 U.S. at 387).

The court of appeals likewise erred in holding that Pennsylvania cannot require that a woman be informed "[t]hat she has the right to review" certain printed materials (discussed above) published by the state health department. This information, unlike that deemed a "parade of horribles" in *Akron* (462 U.S. at 445), is required to be "objective, nonjudgmental and * * * accurate scientific information" (§ 3208(a)(2)). Moreover, the woman is free to decide for herself whether or not she wants to read these pamphlets, and "nothing in the statute prevents the physician from advising that [she] not view [them] or disputing or supplementing them with his own information" (84-495 J.S. App. 140a (Seitz, C.J., dissenting)). This Court has repeatedly held that the state may promote maternal health by ensuring that a woman's abortion decision is truly knowing, voluntary, and informed. It cannot seriously be contended that a state, by offering a person the right to read objective,

nonjudgmental materials before making a decision, would be held unconstitutionally to compel or coerce that person's decision in any other legal context.

f. Section 3214(a) requires that "[a] report of each abortion performed * * * be made to the department on forms prescribed by it." The physician must report routine statistical information about each abortion, such as the patient's age and marital status (but not her identity), the type of abortion procedure used, and any medical complications resulting therefrom. He must also report the basis for his determination "that a child is not viable," and, if he determines that the fetus is viable, to report "the basis for his determination that the abortion is necessary to preserve maternal life or health" (§ 3214(a)(8), cross-referring to § 3211).

The court of appeals held this statute unconstitutional. While acknowledging that this Court has approved recordkeeping and reporting requirements for abortions, it asserted that "[t]he nature and complexity of [Pennsylvania's] requirements * * * have crossed the permissible threshold" (84-495 J.S. App. 80a). It reasoned that Pennsylvania's law would "have a significant impact on the woman's abortion decision" by "increas[ing] the costs of * * * abortions" by an unspecified amount (*id.* at 80a-81a).

The court of appeals' reasoning is seriously flawed. The statistical information Pennsylvania requires to be reported is information that "most physicians would obtain as a matter of course, or which is easily obtained through simpl[e] questions or observation" (84-495 J.S. App. 148a (Seitz, C.J., dissenting)). The court of appeals had no basis for distinguishing Pennsylvania's recordkeeping requirements from those approved in *Danforth*. Compare 428 U.S. at 79-81. The parties' stipulation that Pennsylvania's requirements would increase abortion costs by an unspecified amount—recordkeeping requirements always increase costs, a fact that obviously was equally true in *Danforth*—is irrelevant absent evidence about the magnitude of those expenses. Indeed, a host of state laws (be they tax laws or regulatory re-

quirements) impose increased costs on providers of medical services, and it could scarcely be contended that such laws are therefore unconstitutional. In any event, the record in this case contains no evidence about the actual costs imposed by Pennsylvania's reporting requirements, and the court of appeals thus had "no way of knowing what cost increase is attributable to [them]" (84-495 J.S. App. 149a (Seitz, C.J., dissenting)). Cf. *Ashcroft*, 462 U.S. at 489-490 (noting district court's findings as to cost of pathology reports and holding that those costs imposed "a relatively insignificant burden").

The court of appeals likewise erred in holding that Pennsylvania cannot require doctors to report the basis for their determinations about fetal viability and danger to maternal health. It is far-fetched to suggest, as did the court of appeals (84-495 J.S. App. 81a), that such reporting violates this Court's "directive that a physician be accorded broad discretion" in making these determinations. Obviously, a doctor does not have "discretion" to make unjustifiable and unsupportable judgments about life and death, and it is neither an affront nor an unreasonable burden to require that he rationally explain the basis for such decisions. Nor can it seriously be contended that the need to furnish such explanations unconstitutionally "chills" physicians' willingness to perform abortions. It is hard to see how Pennsylvania can enforce its legitimate interest in protecting fetal life if it is foreclosed from seeking such information.

2. *No. 84-1379.* The Seventh Circuit, ruling unanimously, struck down four sections of the Illinois Abortion Law. The court's decision ignores elementary principles of jurisdiction, comity and federalism in its relentless determination to invalidate the challenged provisions at all costs.

a. Section 6(4) of the Illinois Abortion Law, as enacted in 1979, prescribed a standard of care for a doctor performing an abortion when there existed "a possibility known to him" of fetal viability (84-1379 J.S. App. 8). On November 16, 1979, four days before Section 6(4)'s effective date, the district court issued a preliminary in-

junction against its enforcement, finding that it incorporated an unconstitutional definition of "viability" (*id.* at 3). In October 1983, the district court converted the preliminary injunction into a permanent injunction (579 F. Supp. 464, 470-471 (N.D. Ill. 1983)). On June 30, 1984, while the instant appeal was pending in the Seventh Circuit, the Illinois legislature amended Section 6(4) (see 84-1379 J.S. App. 9, 58-59). The court of appeals recognized that this amendment "substantially altered" Section 6(4) and the court specifically "decline[d] to evaluate [the] constitutionality" of the current version of the statute (84-1379 J.S. App. 9).

The court of appeals, however, proceeded to declare the repealed version of Section 6(4) unconstitutional. Rejecting the State's suggestion of mootness, the court likened the legislature's 1984 revision of the statute to "a defendant's voluntary abandonment" of prior unconstitutional conduct (84-1379 J.S. App. 18). The court theorized that the Illinois legislature "could reenact" the repealed version of Section 6(4), and was persuaded that "such a result would not be unlikely" inasmuch as the legislature had amended Section 6(4) twice during the previous five years (84-1379 J.S. App. 19-20). The court concluded that the State had failed to prove that it would not "return to its old ways" if plaintiffs' challenge were dismissed (*id.* at 20). The court also suggested that the 1983 version of the statute might have residual "chilling effects" despite its repeal (*ibid.*).

The court's reasoning is remarkable. The old version of Section 6(4) had been under continuous injunction from the day it was enacted until the day it was repealed. The statute thus could never have been applied to anyone, and the controversy concerning its validity was accordingly moot. Although this Court has recognized a narrow exception to the mootness doctrine where defendants "voluntarily abandon" challenged conduct for the purpose of evading judicial review (*City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)), we know of no instance, and the court of appeals cited none, where this exception has been held to cover a statutory amend-

ment by a state legislature, which, of course, is not even a "defendant" here.

The court of appeals, moreover, had absolutely no basis for concluding that reenactment of the defunct, allegedly unconstitutional statute was likely. The legislature's previous amendments to the law surely provided no basis for that conclusion, since those amendments, as the court itself recognized, represented faithful and repeated attempts "to alter the contours of [the] statute to reflect the latest judicial pronouncements in the area of abortion and privacy" (84-1379 J.S. App. 20). More generally, principles of federalism and comity make it wholly inappropriate for a federal court to presume that a state legislature and governor will act in bad faith by repealing and then reenacting a statute for the purpose of evading judicial review.[2]

b. Section 6(1) of the Illinois Abortion Law, as amended in 1979, prescribed a standard of care for a doctor performing an abortion "after the fetus is known to be viable" (84-1379 J.S. App. 6). On November 16, 1979, four days before the statute became effective, the district court preliminarily enjoined its enforcement, finding that it incorporated an unconstitutional definition of viability (*id.* at 3). In September 1983, the Illinois legislature amended the definition of viability, providing that a fetus is viable "when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support" (*id.* at 7, 58). On October 14, 1983, the district court sustained the amended definition

[2] Appellants suggest (84-1379 J.S. 43) that, while the controversy as to the old version of Section 6(4) is moot, the controversy as to its current version remains alive, since the court of appeals' rationale for invalidating the former would also apply to the latter. Although we sympathize with appellants' desire to obtain guidance from this Court, we cannot agree with this submission. The court of appeals expressly "decline[d] to evaluate [the] constitutionality" of the current provision (84-1379 J.S. App. 9), and this Court "reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

of viability, held that Section 6(1) was thus constitutional, and lifted the preliminary injunction (579 F. Supp. at 466, 469). On June 30, 1984, while the instant appeal was pending in the Seventh Circuit, the Illinois legislature amended Section 6(1) (see 84-1379 J.S. App. 7, 57-58). The court of appeals recognized that this amendment "substantially transformed section 6(1)" and the court "accordingly decline[d] to discuss the constitutionality" of the current version (*id.* at 7).

Once again, however, the court of appeals proceeded to declare the repealed version of the statute unconstitutional. Rejecting the State's suggestion of mootness, the court noted that old Section 6(1) had operative effect for the eight-month period between October 14, 1983, and June 30, 1984. The court observed that the statute of limitations had not expired with respect to events occurring during that period, and hence suggested that the State "could prosecute plaintiffs * * * if [they] violated [the repealed] section while it remained in effect" (84-1379 J.S. App. 15). The court found "this possibility insufficiently speculative to render [their] challenge * * * moot" (*id.* at 16).

The court's reasoning is flawed. The State explicitly advised the court of appeals that it would not initiate prosecutions of the type appellees assertedly feared (see 84-1379 J.S. 42, 48). Moreover, appellees brought a facial challenge to Section 6(1) and did not allege that they performed any late-term abortions during the eight-month period in question (see *id.* at 43). The possibility that appellees might be prosecuted under the old statute is thus too conjectural to satisfy Article III requirements. See, *e.g.*, *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-110 (1983); *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961).

On the merits, the court of appeals held the old version of Section 6(1) unconstitutionally vague. That statute made it illegal, in the case of a pregnancy termination "after the fetus is known to be viable," for "[a]ny physician or person assisting in such a pregnancy termination" intentionally to fail to manifest a specified standard of care. The court found the statute vague because

it "does not specify * * * which party, physician or assistant, must make this viability determination" (84-1379 J.S. App. 26).

As noted above, the Illinois legislature in September 1983 had amended the statute's definition of "viability" so as to make the determination of viability depend on "the medical judgment *of the attending physician.*" It would have required no great leap of logic for the court of appeals thence to infer that the legislature meant the determination of the attending physician, not of his assistant, to govern under old Section 6(1). Indeed, the 1984 amendment to Section 6(1) makes this explicit. See 84-1379 J.S. App. 57-58. We think that a fair reading of the statute compelled this construction of the 1983 version. In any event, this construction was plainly permitted, and the court of appeals was obliged to adopt that permissible construction under the well-settled principle that federal courts should construe state statutes in a manner favoring their constitutionality.

c. Section 2(10) of the Illinois Abortion Law defines an "abortifacient" as any substance or device "known to cause fetal death." Section 11(d) requires any person who prescribes or administers a substance or device "which he knows to be an abortifacient" to tell the recipient "that it is an abortifacient." Intentional or reckless failure to provide this information is a misdemeanor.

The court of appeals held these two provisions unconstitutional (84-1379 J.S. App. 43). The court did not suggest that Section 2(10)'s definition of "abortifacient" is inaccurate. Nor did it suggest that it is unconstitutional for a state to require a doctor who performs an abortion, or who prescribes an abortifacient, to tell his patient what he is doing. Indeed, a state in regulating abortions indisputably may require "the giving of information to the patient as to just what [will] be done and as to its consequences" (*Danforth*, 428 U.S. at 67 n.8). Rather, the court invalidated these two provisions because Section 2(10), in defining "abortifacient," refers to "fetal death," and because *another* section of the statute—Section 2(9), which was repealed in September

1983—formerly defined "fetus" as "a human being from fertilization until birth" (see 84-1379 J.S. App. 39-40, 60). Reading these three sections together, the court concluded that Section 11(d) unconstitutionally "foist[s] upon the pregnant woman [the State's] view that life begins at conception" (84-1379 J.S. App. 39 (citing *Akron*, 462 U.S. at 444)).

This line of reasoning is strained indeed. Section 11(d) simply requires that a doctor, when administering something that is likely to destroy the fetus, tell his patient that he is administering something that is likely to destroy the fetus. Destruction of the fetus in such circumstances is obviously a "consequence" of which the pregnant woman may be informed (*Danforth*, 428 U.S. at 67 n. 8). Section 11(d) does not say that the doctor must use the words "abortifacient" or "fetal death"; he is free to get the message across in any way he chooses. Moreover, the doctor is not required to refer to, or to say anything about, the definition of "fetus" formerly contained in Section 2(9). The pregnant woman presumably knows what a "fetus" is; if not, the doctor is free to explain it in his own words. All Section 11(d) requires is that the doctor tell her that she is about to have an abortion if that is what she is about to have.[3]

Section 11(d) is an entirely reasonable provision designed to ensure that women seeking birth control assistance understand the difference between "abortifacients" and "contraceptives." The difference is significant for many women, whether for physical, moral, or religious reasons, and the state plainly has a legitimate interest in ensuring that this difference is explained to them so that they may make an informed choice. In adopting a strained and illogical construction of Section

[3] In any event, the court of appeals wholly ignored the fact that the statute's allegedly improper definition of "fetus" was repealed in September 1983. Since then, the statute has defined "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth" (84-1379 J.S. App. 60). It cannot seriously be contended that this definition impermissibly adopts any particular "theory of life" (*Roe* v. *Wade*, 410 U.S. at 162).

11(d), the court of appeals ignored both the State's legitimate interests and proper principles of judicial review.

B. The approach of the courts below betrays in our view an extreme and unseemly hostility to legitimate state regulation of abortion. By subjecting innocuous, even repealed, statutes to strained interpretations, apparently for no other reason than to invalidate them, the courts seemed determined to make regulations so difficult to sustain that abortions before the third trimester will become available virtually "on demand" (*Roe* v. *Wade*, 410 U.S. at 208 (Burger, C.J., concurring)). In so doing, the courts relied heavily on this Court's decision in *Akron*. See, *e.g.*, 84-495 J.S. App. 20a-21a, 24a-25a, 46a-47a, 48a-49a, 79a; 84-1379 J.S. App. 30, 35-36, 38-39. It is perhaps not fanciful to suggest that the courts below may have thought they detected in *Akron* an undercurrent of impatience with state efforts to regulate abortion, and to have taken their cue from that insight.

We believe that *Akron* does represent something of a departure from the Court's previous abortion decisions, both in the standard of review it applies and in the diminished weight it seems to attach to a state's legitimate interests in this area. In reviewing the instant cases, therefore, the Court may find it appropriate to consider whether *Akron* sent an erroneous message to the lower federal courts. There are several respects in which we think that might have happened.

1. This Court in *Roe* v. *Wade* held that the states have legitimate interests in protecting fetal life and preserving maternal health, and that these interests become sufficiently "compelling" at some point during pregnancy to justify restrictions on, or outright proscription of, abortion. Until *Akron*, however, the Court had not suggested that a state's choice among various alternative means of achieving a given "compelling" objective had *itself* to be supported by a compelling state interest. Rather, provided that the state was pursuing a "compelling" objective (*e.g.*, health), a particular regulation was deemed valid if it was "reasonably related" to that objective (*e.g.*, was a rational health regulation) and did

not "unduly burden" the woman's freedom of choice respecting abortion. See, *e.g.*, *Danforth*, 428 U.S. at 80; *Beal* v. *Doe*, 432 U.S. at 445; *Maher* v. *Roe*, 432 U.S. at 473.

The *Akron* decision seems to signal a departure from this analytical framework. Certain passages in that opinion suggest, for example, that a state, in crafting a regulation designed to protect maternal health, must demonstrate a "compelling interest" in selecting one of several options, each of which represents a rational means of achieving the state's goal. This is most evident in the Court's treatment of Akron's "informed consent" provisions. The ordinance required "the attending physician" to inform his patient of the relative risks and consequences of pregnancy and abortion (462 U.S. at 446). The Court acknowledged that this information was "clearly related to maternal health and to the State's legitimate purpose in requiring informed consent" (*ibid.*). The Court acknowledged the importance of having this information conveyed by a "well-trained and competent counselor[]" (*id.* at 449 n. 41). The Court acknowledged that its earlier decisions had "stressed repeatedly the central role of the physician * * * in consulting with the woman about whether or not to have an abortion" (*id.* at 447 (original quotation marks omitted)). And the Court found nothing in the record to "suggest that ethical physicians will charge more for adhering to this typical element of the physician-patient relationship" (*ibid.*). Yet the Court nevertheless held the ordinance unconstitutional because it required the attending physician to make the communication, rather than permitting his assistant to do so. The Court was "not convinced * * * that there is as vital a state need for insisting" that the information be conveyed by the one rather than by the other (462 U.S. at 448).

This holding, in our view, cannot be squared with the Court's previous opinions. A requirement that *the physician* convey the medical information was surely "reasonably related" to Akron's compelling health objective, and that requirement was not shown to have in-

creased the cost of abortions by a magnitude sufficient to impose an "undue burden" on pregnant women's freedom of choice. The regulation should accordingly have been sustained.

2. Prior to *Akron*, this Court had consistently recognized that a State may legitimately "make a value judgment favoring childbirth over abortion" (*Maher* v. *Roe*, 432 U.S. at 474). "The Constitution," the Court had said, "does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions," and hence the fact that a regulation "may inhibit some [women] from seeking abortions is not a valid basis to void the statute" (*H.L.* v. *Matheson*, 450 U.S. 398, 413 (1981)). To the contrary, the Court had held that "state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life'" (*ibid.*, quoting *Harris* v. *McRae*, 448 U.S. 297, 325 (1980)).

Certain passages in *Akron* again seem to signal a departure from these principles. The Court in *Akron* suggested, for example, that a state regulation is invalid if it is "designed to influence the woman's informed choice between abortion or childbirth" (462 U.S. at 444 (footnote omitted)). On that premise, the Court struck down provisions requiring that certain information be furnished to a woman contemplating an abortion, reasoning that the information was "designed * * * to persuade her to withhold" her consent to that procedure (*ibid.*).

Once a woman steps into an abortion clinic, however, there is no way a state can promote its legitimate policy of "encouraging childbirth" without at the same time "discouraging abortion". A woman who enters "an abortion clinic, where abortions for pregnant minors frequently take place," is presumably inclined to terminate her pregnancy, and it is "unlikely that she will obtain adequate counsel from the attending physician at an abortion clinic," much less be dissuaded from her proposed course. *Bellotti II*, 443 U.S. at 641 (original quotation marks omitted). Indeed, as a doctor at one of the clinics involved in *Akron* testified, when a teenager

showed up at the clinic he assumed the decision was made: "When you go to a bar, you go there to drink" (81-746 Resp. Br. 20). Obviously, no state can promote a policy of "encouraging normal childbirth" in such circumstances unless it is allowed to place a counterweight in the other side of the scales.

The *Akron* majority thus had little basis in precedent for suggesting that state action is unconstitutional per se if it is "designed to influence the woman's informed choice between abortion or childbirth." If the state's interest in encouraging childbirth is to mean anything, and if the woman's consent to abortion is to be truly informed, the state must be allowed, in a reasoned and objective way, to tell its side of the story, and a story favoring childbirth is a permissible story for it to tell. Of course, should the state convey that message in an inaccurate or overbearing fashion, or otherwise attempt to compel or coerce the woman's decision, her decision would not be "knowing, intelligent, and voluntary" (*Danforth*, 428 U.S. at 90 (Stewart, J., concurring)), and the state's action would constitute "an unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (*Maher* v. *Roe*, 432 U.S. at 474). But an effort by the state to influence a pregnant woman to choose childbirth instead of abortion, in a manner that does not impair her freedom of choice, can hardly be thought to erect an unconstitutional obstacle.

3. Prior to *Akron*, this Court's abortion opinions generally reflected the well-settled rule that federal courts should accord state statutes a sympathetic construction that favors their constitutionality. See, *e.g.*, *Danforth*, 428 U.S. at 64; *Bellotti II*, 443 U.S. at 645 & n.25; *H.L.* v. *Matheson*, 450 U.S. at 406, 407 & n.14, 412. Once again, however, the *Akron* opinion seems to suggest a more hostile approach. This is perhaps most evident in the majority's treatment of Akron's regulation requiring that physicians performing abortions "insure that the remains of the unborn child are disposed of in a humane and sanitary manner" (462 U.S. at 451). The city averred that this regulation was designed simply "to

preclude the mindless dumping of aborted fetuses onto garbage piles" (*ibid.* (original quotation marks omitted)). The Court nevertheless held the regulation unconstitutionally vague, speculating that "[t]he phrase 'humane and sanitary' does, as the Court of Appeals noted, suggest a possible intent to mandate some sort of decent burial of [the] embryo" (*ibid.* (original quotation marks omitted)).

This approach is difficult to reconcile with the Court's previous opinions. Akron's ordinance was surely susceptible of a constitutional construction. The phrase "humane and sanitary" appears in countless laws regulating health and safety. Congress has even mandated the "humane • • • disposal of excess wild free-roaming horses and burros" (43 U.S.C. 1901(a)(6)). As a familiar regulatory formula, the phrase "humane and sanitary" resembles the phrase "informed consent," which the Court in *Danforth* held not to be vague (see 428 U.S. at 67 n.8). In striking down the Akron formula based on speculation that the draftsmen of the ordinance might have intended to mandate "some sort of decent burial" (462 U.S. at 451), the Court in *Akron* may have invited the kind of unsympathetic statutory construction, the temptation to impugn legislative motives, that the courts of appeals engaged in here.

C. Having said this, candor compels us to state our conviction that *Akron* is a symptom, not the source, of the problem. As the decisions below demonstrate, the constitutional inquiry mandated by *Roe* v. *Wade* is not easy for courts to conduct in a principled fashion. The key factors in the equation—viability, trimesters, the right to terminate one's pregnancy—have no moorings in the text of our Constitution or in familiar constitutional doctrine. Because the parameters of the inquiry are indeterminate, courts are disposed to indulge in a free-ranging, essentially legislative, process of devising regulatory schemes that reflect their notions of morality and social justice. The result has been a set of judicially-crafted rules that has become increasingly more intricate

and complex, taking courts further away from what they do best and into the realm of what legislatures do best.

We recognize that the principle of *stare decisis*, furthering as it does the policies of continuity and consistency of adjudication, weighs against reconsidering recent precedents. See *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 9-10 n.3; *Akron*, 462 U.S. at 420 & n.1. This principle, however, does not count so strongly in constitutional litigation, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. See *Akron*, 462 U.S. at 420; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962). Moreover, this Court must respond to obligations that transcend the institutional concerns underlying the doctrine of *stare decisis*. *See Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.") (Brandeis, J.)). Where a judicial formulation affecting the allocation of constitutional powers has proven "unsound in principle and unworkable in practice," where it "leads to inconsistent results at the same time that it disserves principles of democratic self-governance," this Court has not hesitated to reconsider a prior decision. *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), slip op. 18.

1. To provide a regime for delimiting the permissible scope of abortion regulation, *Roe* v. *Wade* divided pregnancy into three trimesters, with radically different consequences for state regulatory power in each. This analytical framework has proved inherently unworkable. Subsequent developments, both technological and medical, have demonstrated the arbitrariness of these lines: the Court "simply concluded that a line must be drawn, • • • and proceeded to draw that line" (*Garcia*, slip op. 14 (original quotation marks omitted)). Arbitrary line-

drawing may occasionally be necessary to make explicit constitutional rights efficacious, but such arbitrariness gains the appearance of legislation pure and simple where the subject is one upon which the Constitution is silent.

The Court in *Roe* v. *Wade* properly recognized that the states have a strong interest in safeguarding maternal health, but it is difficult to grasp why the compelling quality of this interest should undergo a radical change at the end of the first trimester. The Court made a determination—basically one of legislative fact—that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (410 U.S. at 149, 163). The legislative nature of this finding is shown by "evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, * * * have extended the period in which abortions are safer than childbirth" (*Akron*, 462 U.S. at 429 n.11). The fact that *Akron*, despite this evidence, retained the end of the first trimester as the sharply determinative point demonstrates that point's essential arbitrariness. As Justice O'Connor wrote in dissent, "The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible" (*id.* at 460 (emphasis in original)).

It was similarly arbitrary for the Court in *Roe* v. *Wade* to determine that the state's legitimate interest "in protecting prenatal life" (410 U.S. at 150, 153-154) undergoes a constitutionally significant change at the point of fetal viability. There is no obvious constitutional connection between the ability of a fetus to survive outside the womb, and the magnitude of a state's lawful concern to protect future life. As Justice O'Connor said in her *Akron* dissent, "[*P*]*otential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. * * * The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward" (462 U.S. at 461 (emphasis in original)).

The "viability" standard is particularly unworkable as a constitutional reference point because it changes with advances in technology. The "increasingly earlier fetal viability" demonstrated in recent scientific studies (462 U.S. at 457 (O'Connor, J., dissenting)) obviously owes to improvements in medical techniques, and not to any change in our perceptions about how fully developed or worthy of life a fetus is at any point in time. It is disturbing to attribute constitutional significance to a point which, besides being in motion rather than being fixed, has its movements dictated by advances in engineering rather than by forces more familiar to traditional judicial analysis.

The arbitrary nature of *Roe* v. *Wade*'s analytical framework is reflected in the increasingly complex line-drawing of its progeny. A state may require that certain information be furnished to a woman by a doctor or his assistant (*Akron*, 462 U.S. at 448), but may not require that such information be furnished to her by the doctor himself (*id.* at 449). A state may require that second-trimester abortions be performed in clinics (*Simopoulos* v. *Virginia*, 462 U.S. 506 (1983)), but may not require that they be performed in hospitals (*Akron*, 462 U.S. at 437-439). As each set of these subtle distinctions was crafted, still more unanswered questions were posed. During the decade since *Roe* v. *Wade* the adversaries in the abortion debate have come back again and again, asking this Court to spin an ever-finer web of regulations. The adversaries are back again today. They are sure to return. Each time, the set of rules will get longer and more intricate. This is an inappropriate burden to impose on any court, or on any Constitution.

2. The second, compelling ground for our urging reconsideration of *Roe* v. *Wade* is our belief that the tex-

tual, historical and doctrinal basis of that decision is so far flawed[4] that this Court should overrule it and return the law to the condition in which it was before that case was decided.

There is no explicit textual warrant in the Constitution for a right to an abortion. It is true, of course, that words, and certainly the words of general constitutional provisions, do not interpret themselves. That being said, the further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning. Constitutional interpretation retains the fullest measure of legitimacy when it is disciplined by fidelity to the framers' intention as revealed by history, or, failing sufficient help from history, by the interpretive tradition of the legal community. That tradition is illuminated not only by court decisions, but by the practice of lawyers and legislatures "in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952) (Frankfurter, J.).

We respectfully submit that by these criteria *Roe* v. *Wade* is extraordinarily vulnerable. It stands as a source of trouble in the law not only on its own terms, but also because it invites confusion about the sources of judicial authority and the direction of this Court's own future course. *Stare decisis* is a principle of stability. A decision as flawed as we believe *Roe* v. *Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment.

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[4] This judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, J. H. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Bickel, *The Morality of Consent* 27-29 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920 (1973).

a. The ultimate textual source for *Roe* v. *Wade* (410 U.S. at 129) is the Fourteenth Amendment's guarantee: "nor shall any State deprive any person of • • • liberty • • • without due process of law." It is late in the day to argue that this provision should be limited to its apparent textual meaning: government's actually taking hold of a person, as to confine him, without fair procedures. The expansive possibilities of "due process," however, early offered temptations which by all accounts led to one of the most troubled and demoralizing episodes in our constitutional history, during which the Court repeatedly frustrated the workings of the ordinary democratic process by imposing its own debatable and parochial view of appropriate social policy. *E.g.*, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Lochner* v. *New York*, 198 U.S. 45 (1905). The now prevailing doctrine that the Due Process Clause incorporates particular protections of the Bill of Rights, however controversial on historical grounds,[5] was plainly intended to have the function of reining in such judicial extravagance and reanchoring the interpretation of that Clause in the constitutional text—though somewhat downstream of its historical starting point. See *Adamson* v. *California*, 332 U.S. 46, 69-72 (1947) (Black, J., dissenting).

Viewed in this context, *Roe* v. *Wade* seems particularly ill-founded. Due process analysis, while it must recognize the need to go beyond scrutiny of the few relevant words of the Clause, must nevertheless seek a connection with the intentions of those who framed and ratified the constitutional text. As this Court acknowledged in *Roe* v. *Wade* (410 U.S. at 138-139), however, and as Justice Rehnquist emphasized in dissent (*id.* at 174-176 & n.1), state laws condemning or limiting abortion were very general at the time the Fourteenth Amendment was adopted. Indeed, the period between 1860 and 1880 witnessed "the most important burst of anti-abortion legislation in the nation's history" (J. Mohr, *Abortion in*

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[5] See, *e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

America 200 (1978)). Nor does the tenor and contemporaneous understanding of those laws leave much doubt that they were directed, not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or potential human life (see Mohr at 35-36) and the undermining of family values in whose definition and reenforcement the state has always had a significant stake. It is fair to conclude that those who drafted and voted for the Fourteenth Amendment would have been surprised indeed to learn that they had put any part of such subjects beyond the pale of state legislative regulation.

Surely this historical context of the Due Process Clause is relevant to its interpretation. The most usual and straightforward use of history is to illuminate the intention of controversial constitutional texts. The debate about the practices contemporaneous with the adoption of the Establishment Clause was waged precisely because it has been thought to bear on that Clause's meaning: either to show acceptance of considerable state involvement in religion (see *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4-8; *Marsh* v. *Chambers*, 463 U.S. 783, 787-791 (1983)), or to demonstrate that such involvement had fostered a controversy the Clause was meant to resolve. History similarly has been invoked as dispositive in regard to the acceptability of the death penalty under the Eighth Amendment: How could framers who before, during and after that Amendment's adoption regularly acquiesced in the application of capital punishment be taken to have condemned this practice as cruel and unusual? See *Gregg* v. *Georgia*, 428 U.S. 153, 176-177 (1976) (plurality opinion); *Furman* v. *Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting); *id.* at 408 n.6 (Blackmun, J., dissenting). History has regularly been invoked to elucidate the meaning of the Fifth Amendment's guarantee against self-incrimination (see *Kastigar* v. *United States*, 406 U.S. 441, 443-447 (1972); *Miranda* v. *Arizona*, 384 U.S. 436, 458-460 (1966)), and the Sixth Amendment's guarantee of trial by jury. See *Williams* v. *Florida*, 399 U.S. 78, 86-103

(1970); *Duncan* v. *Louisiana*, 391 U.S. 145, 151-154 (1968). In all these instances the use of history was straightforward. The purpose for which history is invoked in *Roe* v. *Wade*, by contrast, is far from evident. The Court's opinion appears to acknowledge the relevance of history, yet it reaches a conclusion in direct variance with the historical facts recited.

b. History is invoked in another way to take account of developments in society and the law. Such an approach has seemed particularly plausible in determining the application of the Fourth Amendment's protections to such undreamt-of developments as wire-tapping, electronic surveillance, the searches of automobiles and airplanes. History in this sense appears as a vector, in which the original understanding is seen as the point of departure for developing values implied and inchoate at the point of origin. But whether the vector is held to lead to a right to attend criminal trials (*Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 557-580 (1980)) or a right to travel (*Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969)), the Court has always taken pains to trace its point of origin back to specific constitutional provisions by a route either inferential or historical.

In *Roe* v. *Wade*, by contrast, the connections by either route were wholly missing and the Court was forced to leap to its conclusion. Certainly the course of legal attitudes and practice, "the compelling traditions of the legal profession" (*Rochin* v. *California*, 342 U.S. at 171), permit no extrapolation from the past to the Court's conclusion in *Roe* v. *Wade*. The story traced by the Court does not show a steady and growing acceptance of a point of view until the practice in a few jurisdictions can be characterized as anomalous. At most, the historical account in *Roe* v. *Wade* shows an ebb and flow of condemnation and concern about the practice of abortion. More accurately, it would seem that the passage of the Fourteenth Amendment roughly coincided with the rise of particular *stringency* in abortion laws, and that, between 1868 and 1973, such stringent laws appeared as a

general feature of the legal landscape, representing by the Court's own count the policy "in a majority of the States." 410 U.S. at 118. This historical trajectory does not support the conclusion for which it was adduced.

c. There remains the inferential route, by which a specific constitutional text is seen to harbor the germ of a theory that establishes a general and fundamental right. The classic statement of this line of reasoning is found in Justice Harlan's dissent in *Poe* v. *Ulman*, 367 U.S. at 541-543. He wrote that "the liberty guaranteed by the Due Process Clause * * * is not a series of isolated points pricked out in terms of" the particular rights enumerated in the first eight Amendments. Rather, he said, liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints" (*ibid.*).

As Justice Harlan was at pains to insist, however, even this process of inferential extrapolation is directly rooted in textually specified constitutional values. The same connection "to what went before" is insisted upon in *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965). The invocation in *Roe* v. *Wade* of both the particular concept of privacy and of this general mode of constitutional analysis, far from being anchored in text, history, or precedent, is an abrupt departure from the Court's prior decisions.[6] Indeed, all of the "privacy" cases that the Court cited in *Roe* v. *Wade* were applications of accepted

[6] As Dean Ely explained, this Court's invalidation in *Griswold* of a statute regulating the *use* of contraceptives, as opposed to their manufacture or sale, indicated an underlying concern that enforcement of the statute "*would have been virtually impossible* without the most outrageous sort of governmental prying into the privacy of the home." 82 Yale L.J. at 929-930 (emphasis in original). A statute limiting a medical procedure performed by a doctor in a clinic or hospital is simply not analogous; abortion statutes could obviously be enforced without the necessity of repulsive searches. Fourth Amendment policies accordingly provide no support for the holding in *Roe* v. *Wade*.

principles, whether of equal protection[7] or of freedom of expression at the core of the First Amendment.[8] Neither equal protection, nor intrusion upon the home, nor freedom to think or promulgate ideas is involved in laws regulating abortion.

d. There can be no doubt of the strength of the conviction held by some that free access to abortion is a fundamental expression of individual freedom, and that such freedom is the first principle of a just society. A conviction of self-evidence may well accompany a view so strongly held. Yet this conviction does not constitute constitutional argument. It is at best an intuition based in controversial moral and social theories of the good life and of an individual's situation in society, theories "which a large part of the country does not entertain." *Lochner* v. *New York*, 198 U.S. at 75 (Holmes, J., dissenting). And when controversial but seemingly self-evident convictions are translated directly into constitutional doctrine, we risk repeating the whole lamentable story surrounding *Lochner* for which Justice Holmes (*id.* at 76) composed the epitaph at its birth: "[The Constitution] is made for people of fundamentally differ-

[7] *Skinner* v. *Oklahoma*, 316 U.S. 535, 538 (1942) (criminal sterilization act violated equal protection by distinguishing without an adequate basis between persons convicted of larceny and embezzlement); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriages involved "invidious racial discriminations"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446-455 (1972) (statute prohibiting distribution of contraceptives violated equal protection by treating married and unmarried women differently without a rational basis).

[8] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923) (invalidating law prohibiting the teaching of foreign languages in private elementary schools because "[m]ere knowledge of the German language cannot reasonably be regarded as harmful"); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (invalidating statute requiring all children to attend public schools); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) (prosecution of Jehovah's Witness under statute prohibiting sale by minors of periodicals implicates but does not violate freedom of religion); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (reversing criminal conviction for mere possession of films in defendant's home).

ing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

As in logic contradictory premises can be used to prove anything, so in constitutional law principles that are ill-founded can be used to justify any conclusion, and thus rob the law of its intrinsically compelling force. And when constitutional law, which is above ordinary politics, seeks to settle disputes of value and vision which are the stuff of politics, both law and politics are more not less subject to the kind of intense pressures which have characterized the abortion debate since *Roe* v. *Wade*.

CONCLUSION

The portions of the court of appeals' judgments that invalidate appellants' abortion regulations should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,
Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

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On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. The purpose of APA, as set forth in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all branches in the broadest and most liberal manner." A substantial and growing number of APA's member psychologists are health-care providers licensed to provide mental health services to individual clients.

APA has participated frequently as an *amicus* in this Court, including its recent participation in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

The appeal in No. 84-495, *Thornburgh v. American College of Obstetricians and Gynecologists*, raises three issues that are of particular interest to APA and its members. The first is the extent to which a State may intrude on the discretion of health professionals engaged in pre-abortion counseling to provide information appropriate to the needs and circumstances of individual women seeking abortions. The second issue involves the scope of the definition accorded "medical risk" by the Pennsylvania Legislature in setting forth the degree of care required of physicians in performing post-viability abortions. The third issue of interest to APA is the competence of minors to consent to abortions. APA submits this *amicus* brief to bring to the Court's attention relevant empirical studies that will not be addressed by the parties.

This brief is filed pursuant to Rule 36.2 of the Rules of this Court. The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises several issues relative to the Pennsylvania Abortion Control Act[1] ("the Act") that this Court has addressed in prior decisions dealing with abortion. Although APA presents arguments regarding three of the issues raised on this appeal, proper resolution of two of those issues—the statute's informed consent requirements and the definition of "medical risk"—requires only that the Court reaffirm its earlier holdings. The informed consent provisions at issue in this case are strikingly similar to those provisions struck down in *City of Akron v. Akron Center for Reproductive Health*, 462

[1] 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1982).

U.S. 416 (1983), and suffer from the same constitutional infirmities noted by this Court in that opinion. Similarly, in view of this Court's holding in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), that "[maternal] health" and "medical judgment" should be broadly construed to include "[a]ll . . . factors relevant to the well-being of the patient," including "psychological" and "emotional" factors, the provision of the Act which precludes consideration of psychological and emotional factors in assessing the medical risks to pregnant women arising from particular abortion techniques is impermissibly restrictive.[2] *See also Colautti v. Franklin*, 439 U.S. 379 (1979).

With respect to the third issue addressed in this brief —the parental/judicial consent provisions of the Act— the plurality opinion of this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), makes clear that the parental attendance provisions of the implementing Rules[3] impermissibly burden the rights of both mature and immature minors to seek abortions.

In addition, regarding the larger issue of the competence of minors to give informed consent to abortion, APA urges this Court to extend to adolescent women, as implicit in their fundamental right of personal privacy, the full right to "deci[de] whether or not to terminate [one's] pregnancy." *Roe v. Wade*, 410 U.S. 113, 153

[2] Although the court of appeals did not expressly address this issue, it was raised by the plaintiff-appellees in their Complaint. APA advances this argument as an additional ground for affirming the court of appeals' judgment that § 3210(b) is unconstitutional. In the alternative, should the Court determine that, but for this issue, reversal is otherwise appropriate, APA urges the Court to remand to the court of appeals in order to give that court an opportunity to decide whether the statutory construction of "medical risk" is so narrow as to render § 3210(b) unconstitutional on that ground.

[3] Section 3206 of the Act required the Pennsylvania Supreme Court to promulgate rules implementing the provisions of the Act governing the alternative judicial proceedings by which minors may seek authorization for abortions. *See infra* at III.A.

(1973). This argument is supported by the growing body of methodologically sound and generally accepted psychological research which concludes that minors fourteen years of age and older generally possess the ability to understand treatment alternatives and their attendant risks and benefits, as well as the demonstrated capacity for rational decisionmaking, to a degree that is not measurably different from that of adults. In view of these scientific findings, APA urges this Court to adopt for women fourteen years of age and older a presumption of competence to make reasoned abortion decisions and to give informed consent, and to extend to those women the full constitutional protections this Court already has extended to women eighteen years of age and older.

ARGUMENT

I. THE MANDATORY PROVISIONS OF § 3205 OF THE ACT IMPERMISSIBLY INTRUDE ON THE DISCRETION OF A PREGNANT WOMAN'S PHYSICIAN TO ENSURE EFFECTIVE COUNSELING AND UNDULY INTERFERE WITH A WOMAN'S CONSTITUTIONAL RIGHT TO MAKE DECISIONS CONCERNING ABORTION.

Over a decade ago, this Court held that the "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 110, 153 (1973). *See also Doe v. Bolton*, 410 U.S. 179 (1973). That holding was reaffirmed just two years ago in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). As with most rights, however, the right to choose to terminate one's pregnancy is not absolute; rather, it " 'must be considered against important state interests in abortion.' " *City of Akron*, 462 U.S. at 427 (quoting *Roe v. Wade*, 410 U.S. at 154). One of those interests, recognized by this Court as sufficiently compelling to justify governmental regulation of this fundamental right after the first trimester

of pregnancy,[4] is the State's interest in the preservation and protection of the health of women who have abortions. However, even regulations designed to further important health-related concerns must be narrowly drawn and "reasonably designed to further that state interest" in maternal health. *City of Akron*, 462 U.S. at 434. Thus, although informed consent requirements usually further the State's interest in protecting the health of pregnant women,[5] this Court recently struck down an informed consent provision that went "beyond permissible limits." *Id.* at 444.

The limits of permissible state regulation of the abortion decision in furtherance of the State's interest in ensuring that a woman's decision is "informed and freely given and is not the result of coercion,"[6] are defined by two principles, recognized by this Court in *Doe v. Bolton*, 410 U.S. at 191-93, and *City of Akron*, 462 U.S. at 444-45. Those principles require deference to the professional judgment of health professionals involved in counseling the woman and performing the abortion, and respect for the women's constitutionally protected right to exercise her choice unburdened by coercive efforts by the State to inject its policy preferences into her decisionmaking process. *Cf. Maher v. Roe*, 432 U.S. 464, 471-74 (1977). The informed consent requirements of the Pennsylvania Act violate these principles.

Section 3205(a) of the Act, which requires written certification by a woman prior to having an abortion of her "voluntary and informed consent" to the procedure, provides that, absent a medical emergency, a woman's consent to an abortion is "voluntary and informed if and

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[4] Even during the first trimester, regulations having "no significant impact on the woman's exercise of her right [to choose abortion] may be permissible where justified by important state health objectives." *City of Akron*, 462 U.S. at 430. *See also Planned Parenthood Ass'n v. Danforth*, 428 U.S. 52 (1976).

[5] *See Planned Parenthood Ass'n v. Danforth*, 428 U.S. at 65-67.

[6] *Planned Parenthood Ass'n v. Danforth*, 428 U.S. at 85.

only if . . . the physician who is to perform the abortion" [7] provides her with the following information prior to performing the abortion:

> [§ 3205(a)(1)](i) The name of the physician who will perform the abortion;
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> (ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable;
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> (iii) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;
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> (iv) The probable gestational age of the unborn child at the time the abortion is to be performed;
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> (v) The medical risks associated with carrying her child to term;
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> [§ 3205(a)(2)](i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care; and

[7] Section 3205(a) limits the counseling function regarding the information to be provided by subsection (1) to "the physician who is to perform the abortion or [to] the referring physician *but not . . . the agent or representative of either.*" (Emphasis added). APA argued in its *amicus* brief in *City of Akron* that "effective counseling . . . require[s] specialized training. . . . [M]ost doctoral level professional psychologists have received intensive training in interpersonal dynamics and counseling techniques, and most of them would be qualified to provide effective abortion counseling." Brief for *Amicus Curiae* American Psychological Association In Support of Respondents at 14-15. This argument was accepted by the Court and, in light of its holding that it is "unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent," 462 U.S. at 446-49, the Commonwealth conceded the unconstitutionality of this language in § 3205(a) in the court of appeals, and the issue has not been raised before this Court. For purposes of our analysis, we will assume that "much, if not all of [the information]" in § 3205(a)(1) may be communicated to the pregnant woman by a qualified nonphysician counselor. *Id.* at 445-46, n.37.

> (ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

In addition, § 3205(a)(2)(iii) requires that the woman be informed that she has the right to review certain materials "printed" by the Pennsylvania Department of Public Health.[8] Those materials are "designed to inform the woman of public and private agencies and services available to assist [her] through pregnancy, upon childbirth and while the child is dependent, including adoption agencies." § 3208(a)(1). The materials are required to contain a statement reiterating the availability of agencies "willing and able to help you carry your child to term and to assist you and your child after your child is born," and advising the woman further that

> [t]he Commonwealth of Pennsylvania strongly urges you to contact [such agencies] before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

Id. Finally, a woman seeking an abortion must be informed of her right to review "objective, nonjudgmental and [scientifically] accurate" materials designed to inform her of the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival." § 3208(a)(2).

The court of appeals held that the information required by § 3205(a) to be communicated to women seeking abortion, like that required in *City of Akron*, was designed "'not to inform the woman's consent but rather to persuade her to withhold it altogether.'" *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 296 (3d Cir. 1984) (quoting *City of Akron*, 462 U.S. at 444).

[8] The "printed materials" are described in detail in § 3208 of the Act.

Moreover, citing this Court's ruling in *City of Akron*, the court of appeals found that the Act's informed consent provisions impermissibly intruded upon the discretion of the pregnant woman's physician or other counselor to "tailor the information given to her to the exigencies of the case." 737 F.2d at 296. Although noting that some of the provisions of § 3205(a) were "unobjectionable standing alone," the court of appeals, citing *City of Akron*, found those provisions unseverable from the unconstitutional provisions of the section. *Id.* The court also concluded that the "printed materials" requirement of § 3208 was "inextricably intertwined with section 3205, [finding] no certainty of any legislative intent that section 3208 should stand alone." *Id.* at 298. Thus, the court held "the entire statutory scheme" of §§ 3205 and 3208 invalid and unenforceable. *Id.* at 296.

The court of appeals' judgment should be affirmed. Virtually all of the information required by §§ 3205 and 3208 to be provided to pregnant women seeking abortions fits within either the "undesired and uncomfortable straitjacket" category, against which this Court warned in *Planned Parenthood Ass'n v. Danforth*, 428 U.S. 52, 67, n.8 (1976), and *City of Akron*, 462 U.S. at 445, as an impermissible intrusion on physicians' and counselors' discretion, or the "parade of horribles" category recognized by this Court in *City of Akron* as a blatant and impermissible attempt by the State to compel the woman to choose *not* to have an abortion. *Id.*

Effective counseling, which is critical for meaningful informed consent, requires the exercise of professional discretion regarding what *not* to say in any particular situation, as well as what *to* say. The provisions of § 3205 preclude such counseling by "specif[ying] a litany of information that the physician [or counselor] must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." *Id.* For example, the requirement that every woman be informed of "[t]he fact that medical assistance benefits

may be available for prenatal care, childbirth and neonatal care," and the fact that "the father is liable to assist in the support of her child," as provided by §§ 3205(a)(2)(i) and 2(ii), may be irrelevant to a woman for whom an abortion is required as a life-preserving measure. Moreover, the requirement that such information be communicated may interfere significantly with a health professional's ability to counsel effectively such a woman, particularly if she has moral, religious or other personal beliefs that conflict with her decision. Although most women who choose to have abortions suffer no significant depression or trauma,[9] informing a woman who has no other realistic alternative of the potential liability of the father, or the availability of medical assistance benefits, may increase her depression and trauma at having to have an abortion and thereby negatively affect the procedure or her recovery. In these circumstances such counseling is very likely to be irrelevant, insulting and destructive of the trust necessary for an effective counseling relationship. In addition, advising such a woman of "the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable"[10] may be even *more* destructive of the counseling

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[9] *See* n. 11, *infra*.

[10] The Commonwealth argues that § 3205(a)(1)(ii) was upheld by this Court in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). However, because summary affirmances "'affirm the judgment [only, and] not necessarily the reasoning by which it was reached,'" the precedential value of the Court's affirmance in *Fitzpatrick* is limited. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). This is particularly the case in circumstances such as those presented in this case where subseqent decisions of this Court, after lengthy and reasoned analyses, have made clear that provisions such as § 3205(a)(1)(ii) are constitutionally infirm. *See Fusari v. Steinberg*, 419 U.S. at 392 (Burger, C.J., concurring) (citations omitted) ("An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously

relationship, as well as trauma-inducing for a significant period of time before and after the abortion. To the extent that provisions like § 3205 intrude on the physician's or counselor's exercise of professional discretion by requiring the communication of such specific information without regard to the particular circumstances, this Court has struck them down as "unreasonably . . . plac[ing] 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *City of Akron*, 462 U.S. at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604, n.33 (1977)).

Similarly, the requirement that *every* woman be told of the "particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility," § 3205(a)(1)(iii), intrudes on the physician's or counselor's discretion to tailor the information to the needs of each woman. Although *Danforth* upheld a requirement that women seeking abortions be provided *general* information "as to just what would be done and . . . its consequences," 428 U.S. at 67, n.8, it "properly le[ft] the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'" *City of Akron*, 462 U.S. at 447. To require the disclosure to all women of every conceivable risk of the proposed abortion technique, no matter how remote the risk or psychologically damaging the disclosure may be, would be contrary to the currently accepted practice of health care professionals and often would be contrary to the best health interests of the woman. Although this Court has stated that "[c]onsistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion[,]"

announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.").

City of Akron, 462 U.S. at 445, there are many means by which a physician or counselor may ascertain the patient's understanding, and the choice of such means rests well within the scope of his professional discretion. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 322-23, n.30 (1982).

Likewise, the requirements that every woman be informed of the possibility of "detrimental physical and psychological effects which are not accurately foreseeable," and of the "printed materials" provided by the Commonwealth which describe, *inter alia*, the "anatomical and physiological characteristics of the unborn child" are constitutionally defective. Like the "parade of horribles" struck down in *City of Akron*, these provisions are designed more to coerce a woman's choice than to inform it. First, the possibility of detrimental physical and psychological effects resulting from an abortion performed in a competent and professional environment is no greater or less than the possibility of such effects from other unregulated medical or surgical procedures.[11]

[11] Indeed, a great many empirical studies have shown that abortion rarely causes or exacerbates psychological or emotional problems; rather, the great majority of women who have had abortions express feelings of relief. *See, e.g.*, Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 J. NERVOUS & MENTAL DISEASE 417 (1966); Patt, Rappaport & Barglow, *Follow-up of Therapeutic Interruption of Pregnancy*, 20 ARCHIVES OF GEN. PSYCHIATRY 408 (1969); Senay, *Therapeutic Abortion: Clinical Aspects*, 23 ARCHIVES OF GEN. PSYCHIATRY 408 (1970); Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry*, 126 AM. J. PSYCHIATRY 1224 (1970); Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 AM. J. OBSTETRICS & GYNECOLOGY 347 (1971); Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 AM. J. ORTHOPSYCHIATRY 574 (1973); Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 AM. J. PSYCHIATRY 97 (1967); Niswander & Patterson, *Psychological Reaction to Therapeutic Abortion*, 29 OBSTETRICS & GYNECOLOGY 702 (1967).

Moreover, there is some empirical evidence that positive personality changes occur as a result of abortions. For example, researchers have noted improved contraceptive use after abortions,

However, singling out abortion for this recitation of detrimental effects has the purpose and effect of conveying the *misleading* and factually inaccurate impression that abortions are more likely than other procedures to produce such detrimental effects. In *City of Akron*, the Court found that a similar statutory provision was "intended to suggest that abortion is a particularly dangerous procedure," and that finding was a "decisive[] objection" to the provision's constitutionality. 462 U.S. at 445.

Second, the "printed materials" described in § 3208 clearly are designed to deter pregnant women from choosing abortion. Although review of these materials is not mandatory, the characterization of these materials, which a counselor *is* required to convey to women seeking abortions, as descriptive of "the unborn child"—a phrase defined by § 3203 of the Act as "a human being from fertilization until birth and includes a fetus"—is unduly inflammatory, inherently coercive, and violates the teaching of *Roe v. Wade*, 410 U.S. at 159-62, that a State "may not adopt one theory of when life begins to justify its regulation of abortions." *City of Akron*, 462 U.S. at 444. Moreover, notwithstanding the Legislature's intent that these materials be "objective, nonjudgmental and [scientifically] accurate," § 3208(a)(2), they are as "specula[tive]" and coercive, and therefore unconstitutional, as the similar information required by the Akron ordinance and struck down by this Court in *City of Akron*. *Id.*

Although the Court in *City of Akron* found information as to gestational age of the fetus, and the availability of medical assistance during pregnancy and after childbirth, including adoption assistance, unobjectionable

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with women reporting feelings of increased self-directedness, autonomy, and efficiency. *See* Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 AM. J. ORTHOPSYCHIATRY 503 (1977). These findings regarding the psychological effects of abortion on women have been noted for adolescent women as well as adult women.

"to the extent it is accurate, . . . and probably [ ] routinely made available to the patient," 462 U.S. at 445-46, n.37, the requirement that such information be provided in *all* circumstances unduly interferes with the physician's or counselor's discretion to provide appropriate information in a particular case. For example, a victim of incest or rape could be severely traumatized or depressed by recalling the offense—a recollection that necessarily would be triggered by the required advice regarding the gestational age of the fetus—and her physician or counselor should have the discretion to determine that the detrimental effects to the woman from providing such information would outweigh any conceivable benefits. It may be no less traumatizing a reminder for such a victim to be *mandatorily* informed of the availability of prenatal and postnatal medical assistance, once she and her physician have determined that abortion is the only means of ending her nightmare. In such cases, the physician or counselor should be free to exercise professional judgment.

The requirement that this information be provided to *all* women seeking abortions places the physician or counselor who determines that the provision of this information in a particular case would have a detrimental impact on the woman in the "undesired and uncomfortable straightjacket in the practice of his profession" warned against in *Danforth*, 428 U.S. at 67, n.8. However, to construe the Act as containing an implicit distinction between those applications of the informed consent requirements which impermissibly intrude on the counselor's discretion and those which do not, and severing the former, would so eviscerate the Legislature's intent that *all* women seeking abortions be told *all* information specified in the Act, as to "create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

The remaining informational requirements—those which neither impermissibly intrude on the physician's or coun-

selor's discretion nor seek to exert undue influence on the woman's choice—are so few and insignificant that, notwithstanding the Act's severability clause,[12] "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of [those provisions] which [are] not." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 931-32 (1983). *See also Sloan v. Lemon*, 413 U.S. at 834. Those unobjectionable provisions are the requirement that the woman be informed of the name of the doctor who will perform the abortion, and of the medical risks associated with carrying her child to term, §§ 3205(a)(1)(i), (1)(v), and the *optional* requirement that, upon her request, the woman be advised of agencies available to provide post-childbirth assistance, § 3208(a)(1). Standing alone, these requirements do not in any way serve the Commonwealth's interest in ensuring that a woman's abortion choice will be an informed one. Thus, in the absence of the impermissible provisions, these requirements would have so little impact on the Commonwealth's asserted interests that it is extremely unlikely they would have been enacted. In light of these considerations, and, consistent with this Court's holding in *City of Akron*, 462 U.S. at 445-46, n.37, the court of appeals correctly determined that the unobjectionable provisions were not severable from the unconstitutional provisions.

In short, the informed consent requirements of §§ 3205 and 3208 have the substantial purpose and effect of undermining, rather than furthering, the Commonwealth's legitimate interest in ensuring that a woman's consent to abortion is voluntary and adequately informed. As a result, these provisions fail the constitutional standard, established by this Court in *Roe v. Wade*, 410 U.S. at 163, and most recently articulated in *City of Akron*, 462

[12] *See* 1982 Pa. Legis. Serv. 750, 794, § 5 (Purdon).

U.S. at 430-31, of being narrowly drawn and "reasonably relate[d] to the preservation and protection of maternal health." Accordingly, the court of appeals' judgment as to §§ 3205 and 3208 should be affirmed.

II. THE RESTRICTIVE DEFINITION OF "MEDICAL RISK" IN § 3210(b) OF THE ACT IMPERMISSIBLY PRECLUDES CONSIDERATION OF ALL FACTORS RELEVANT TO AN INFORMED DETERMINATION OF MATERIAL HEALTH, AND THEREBY UNDULY BURDENS A WOMAN'S ABORTION DECISION.

Section 3210 of the Act prohibits the knowing performance of abortions of viable fetuses, unless the physician who performed the abortion made a good faith medical judgment that the fetus was not viable at the time of the abortion, or the abortion was necessary to preserve maternal life or health. Subsection (b) of § 3210 requires generally that physicians performing post-viability abortions observe a standard of care designed "to preserve the life and health of any unborn child intended to be born and not aborted." To that end, physicians performing post-viability abortions are required to employ the abortion technique

> which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or the health of the pregnant woman than would another available method or technique . . . . *The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother.*

§ 3210(b) (emphasis added).

The court of appeals held this provision unconstitutional on the ground that the "significantly greater risk" threshold requires the woman to bear an increased medical risk in order to protect or preserve the life of the viable fetus. 727 F.2d at 300. Although the court of

appeals did not decide whether a State constitutionally may exclude psychological and emotional factors from a physician's assessment of "medical risk," the APA respectfully urges the Court to address this issue as an additional, or alternative, ground for affirming the court of appeals' judgment as to § 3210(b).

Since this Court first held that the right to choose abortion is protected by a woman's fundamental right to personal privacy, it has recognized that one of the essential components of that right is the woman's right to exercise her choice in consultation with her physician and other health professionals, who must be given "the room [they] need[] to make [their] best medical judgment[s]." *Doe v. Bolton*, 410 U.S. at 192. Recognizing the broad range of factors that necessarily inform the "medical judgment" of health professionals engaged in abortion counseling, including assessments of "medical necessity," this Court held that "medical judgment" includes "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.* The Court has not narrowed this broad construction of "medical judgment" in its subsequent opinions. Nor has it suggested that its application be limited to consultations regarding *whether* to abort, rather than *how* to abort. To the contrary, the Court recently reiterated its longstanding view that "[t]he physician's exercise of this [broad] medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion." *City of Akron*, 462 U.S. at 427. *See also Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (striking down a statutory provision similar to § 3210(b) for failing to make clear that "*all* factors relevant to the health of the woman may be taken into account by the physician in making his decision" regarding the choice of post-viability abortion techniques) (emphasis added).

The requirement that all factors relevant to a woman's health be considered by a physician in choosing an appropriate abortion technique clearly requires the consideration of psychological and emotional factors. Psychological and emotional health is no less significant to an individual's overall health than is purely physical health. Under the Pennsylvania Act, a woman suffering from severe pain phobias and anxieties could nevertheless be forced by the limitations of § 3210(b) to submit to a Cesarean section operation or labor-inducing infusions to preserve the viability of the fetus, when another technique would not pose so substantial a threat to her mental health. Although very few abortions are performed during the post-viability period, the few that are performed, in the absence of severe medical complications to the mother, are often performed, in part, because the fetus, though viable, could not lead a normal life. For example, amniocentesis may reveal the existence of extremely severe deformities or other fetal disorders with which the woman or her family may be ill-equipped emotionally to cope. To require her to choose a method of abortion that would preserve the viability of such a fetus could be psychologically devastating. Similarly, the Act would require a woman for whom aborting a live fetus might exacerbate existing anxieties, self-destructive tendencies or other psychological or emotional disorders to assume the risk of such disturbances if she can identify no physical health problem that would be significantly adversely affected by the fetus-saving abortion technique. Such results—which may create substantial psychological damage that lingers long after physical wounds have healed—are indeed anomolous in view of the broad definition accorded "maternal health" by this Court and the health profession generally. Thus, § 3210(b), by precluding consideration of psychological and emotional health factors equally with physical health factors, impermissibly burdens a woman's right to choose abortion in consultation with her physician.

Moreover, although mental health and physical health are commonly thought of as two separate components of an individual's health, they are frequently interrelated.

Indeed, the attempt to separate emotional and psychological factors from purely physical factors in assessing the medical or health risks of alternative abortion techniques would be a difficult, if not impossible, task. As health care professionals increase their understanding of human illnesses and treatments, their increased appreciation of the role played by psychological and emotional factors has blurred significantly any distinction between the physical and the psychological in the health care field. Psychological and emotional disorders can result in severe mental turmoil, loss of contact with reality, chronic anxiety, guilt, depression, and self-destructive behaviors, all of which may be manifested in physical symptoms. Indeed, many of today's major health problems, *e.g.*, heart attacks, cancer, strokes, and drug addiction, which previously had been considered purely "physical" in their origins, have been determined to be causally related to psychological factors. Likewise, many physical traumas, including strokes, mastectomies and cancer, have a major impact on the psychological health of individuals. *See generally* AMERICAN PSYCHOLOGICAL ASSOCIATION, PSYCHOLOGY AS A HEALTH CARE PROFESSION at 6-8 (1983).

The interrelatedness of psychological and physical factors is no different in the abortion context. The mental disorders noted above that may result from using an abortion technique that preserves the life of the fetus may create a sufficient risk to the woman's overall health that an alternative method of abortion may be warranted. Under this Court's reasoning in *Doe v. Bolton*, a health care professional's discretion must be broad enough to permit the candid exploration of these factors with the patient, and the consideration of these factors in assessing the "medical risk" to her of the various abortion methods available.

III. THE PARENTAL/JUDICIAL CONSENT PROVISIONS OF § 3206 OF THE ACT UNDULY BURDEN THE RIGHTS OF MINORS TO SEEK ABORTIONS.

Although this Court has held generally[13] that "child[ren], merely on account of [their] minority, [are] not beyond the protection of the Constitution," it has asserted, nevertheless, that "the status of minors under the law is unique in many respects[,]" *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (*Bellotti II*), and has accorded States "somewhat broader authority to regulate the activities of children than of adults." *Danforth*, 428 U.S. at 74. Regarding the constitutionally protected privacy rights of minors, this Court generally has upheld state restrictions serving "any significant state interest . . . that is not present in the case of an adult." *Id.* at 75. *See City of Akron*, 462 U.S. at 427-28, n.10; *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977). This lesser standard of scrutiny has been deemed "appropriate"

> both because of the States' greater latitude to regulate the conduct of children, *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968), and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. *See, e.g.*, [*Danforth*], 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part).

Id. at n.15 (Brennan, J., concurring).[14]

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[13] *See, e.g., Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."). *See also Carey v. Population Services Int'l*, 431 U.S. 678, 692, n.14 (1977) (and cases cited therein).

[14] In *Bellotti II*, a plurality of this Court identified two additional reasons for not equating the constitutional rights of minors

In the context of abortion, this Court has stated clearly that " 'the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor.' " *City of Akron*, 462 U.S. at 439 (quoting *Danforth*, 428 U.S. at 74). Although the State's interest in protecting minors will justify "a requirement of a consent substitute, either parental or judicial," the Court has

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with those of adults: the "peculiar vulnerability" of children; and the importance of the parental role in child-rearing. 443 U.S. at 634. However, as this Court noted in *Bellotti II*, neither of these factors supports a restrictive construction of minors' privacy rights in the abortion context. In view of their "probable education, employment skills, financial resources and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor," *id.* at 642, thus rendering pregnant minors as "peculiar[ly] vulnerab[le]" to the hard realities of carrying a pregnancy to term as they are to the stress of abortion. As a result, to the extent the "vulnerabilities" of pregnant minors require the State to show " 'concern, . . . sympathy, and . . . paternal attention,' " *id.* at 635 (quoting *McKiever v. Pennsylvania*, 403 U.S. 528, 550 (1971)), the neutral application of *that* concern would result in abortion as readily as in continuing the pregnancy.

Likewise, the State's interest in fostering the parental role in child-rearing, to the extent that it "implies a substantial measure of authority over one's children," *Bellotti II*, 443 U.S. at 638, must give way to the mature minor's right to choose abortion independently of parental consultations or consent, or to the best interests of an immature minor. *Id.* at 647-48. *See also Danforth*, 428 U.S. at 75 (citation omitted):

> One suggested interest is the safeguarding of the family unit and of parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

warned "that the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *City of Akron*, 462 U.S. at 439-40 (citing *Bellotti II*, 443 U.S. at 643-44). *See also Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1983). The "alternative procedure" must assure that a resolution of the issue and any subsequent appeals "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U.S. at 644. Thus, notwithstanding the "legitimate interest in encouraging parental involvement in their minor children's decision to have an abortion[,] . . . these state and parental interests must give way to the *constitutional right* of a mature minor or of an immature minor whose interests are contrary to parental involvement." *City of Akron*, 462 U.S. at 428-28, n.10 (emphasis added).

In developing these standards, this Court necessarily has distinguished abortion decisions of minors from other decision of minors.[15] Indeed, the right to choose abortion, especially as to minors, involves the exercise of a constitutional right of *unique* character. *See Bellotti II*, 443 U.S. at 642-43. The elements recognized by this Court as contributing to the "unique nature and consequences of the [minor's] abortion decision," *id.* at 643, include the inability of the pregnant minor to postpone her decision, and the potentially severe negative impact on the minor of unwanted motherhood, given her "probable education, employment skills, financial resources and emotional maturity." *Id.* at 642. Thus, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Id.*

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[15] *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (upholding parents' right to admit a minor to a state mental institution). *See also Sec'y Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

A. Section 3206 Of The Act Fails To Meet The *Bellotti II* Confidentiality Requirement.

Except for medical emergencies, § 3206 of the Pennsylvania Act prohibits the performance of abortions on unemancipated women under the age of eighteen unless both the woman and one of her parents or person standing *in loco parentis* provide written informed consent to the procedure. Alternatively, the minor may seek judicial authorization for an abortion. § 3206(c). The court is required to authorize the abortion if it determines that "the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." *Id.* If the Court determines that the woman is not mature and is incapable of giving informed consent, it must authorize the procedure if it determines that an abortion is in her best interest. Section 3206 also requires that judicial proceedings pursuant to this section be confidential and be given "such precedence over other pending matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman, but in no case shall the court fail to rule within three business days of the date of application." § 3206(f). Subsection (h) provides for an "expedited confidential appeal" of orders denying authorization for an abortion. In addition, § 3206 requires the Supreme Court of Pennsylvania to "issue promptly such rules as may be necessary to assure that the process provided in [the] section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition." § 3206(h).

The court of appeals found that § 3206 was facially valid, but enjoined its operation until the Pennsylvania Supreme Court promulgated rules to assure the confidentiality of the proceedings and promptness of their disposition. 737 F.2d at 297. On November 26, 1984, the Pennsylvania Supreme Court promulgated "New Orphans' Court Rule 16 Governing Proceedings Pursuant

to Section 3206 of the Abortion Control Act." No. 198 E.D. Misc. Docket 1984.[16]

Although § 3206, as implemented by Orphans' Court Rule 16, meets the expedited hearing and appeal requirement of *Bellotti II*, it fails to meet the "anonymity" or confidentiality requirement. Rule 16.4 provides that "[a]ll persons shall be excluded from the hearings except the applicant, *her parents or person standing in loco parentis*, . . . and such other persons whose presence is specifically requested by the applicant or her guardian." (Emphasis added.) As written,[17] this provision establishes a right in the minor's parents or persons standing *in loco parentis* to attend the hearing, *even if the minor wishes to exclude them.* In addition, it allows her guardian to request the presence of other persons whom the minor may not wish to have present at the hearing. Such a requirement, even assuming the parents or guardians have no veto authority over the mature minor's decision or the court's determination of the immature minor's best interests, impermissibly intrudes on the privacy rights of mature minors to make independent abortion decisions free of parental involvement. *See City of Akron*, 462 U.S. at 441, n.31; *H.L. v. Matheson*, 450 U.S. 398, 420 (1981) (Powell, J., concurring); *id.* at 428, n.3 (Marshall, J., dissenting). Moreover, even *immature* minors are entitled to "go directly to a court without first consulting or notifying [their] parents" for judicial determination of whether an abortion is in their best interests. *Bellotti II*, 443 U.S. at 647. The importance of providing minors, particularly immature minors, with direct access to an independent decisionmaker is especially sig-

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[16] Because of the pendency of this appeal, on February 22, 1985, the district court denied the Commonwealth's motion to vacate the injunction against enforcement of § 3206.

[17] Whatever doubt may have existed as to the Rule's proper construction is dispelled by the statement in the Commonwealth's Brief at 79, that "the proceeding *shall be closed to all but essential persons, such as the minor's parents.*" (Emphasis added.)

nificant in circumstances involving the possibility of parental incest, or in other circumstances in which a minor indicates that, due to her parent's "strong views on the subject of abortion"—and their consequent hostility and obstructive potential toward her contemplated course of action—consultation, notification, or any other involvement of her parents would not be in her best interest. *Id.*[18] *See also H.L. v. Matheson*, 450 U.S. at 420 (Powell, J., concurring).[19] Because the undesired attendance of parents at § 3206 proceedings is necessarily predicated on some kind of notification to them independent of the minor, these considerations, articulated by this Court in the context of parental notification statutes, are equally applicable to the Rule 16.4 provision which precludes the exclusion of parents from such proceedings. As a result, § 3206 impermissibly burdens minors' rights to seek abortions.

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[18] In *Bellotti II*, a plurality of this Court struck down a requirement that an available parent be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion because that requirement imposed "an undue burden upon the exercise by minors of the right to seek an abortion." 443 U.S. at 647. Justice Powell observed:

> As the District Court recognized, "there are parents who would obstruct, and perhaps altogether prevent the minor's right to go to court." There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

Id. (citation omitted).

[19] Of course, the court could determine that a particular immature minor's best interests would be served by parental consultation, and could decline to authorize an abortion on that ground. *Bellotti II*, 443 U.S. at 648.

B. The Requirement That Minors Fourteen Years Of Age And Over Seek Parental Or Judicial Consent For Abortions Does Not Satisfy The *Danforth* Significant State Interest Test.

An even greater burden on these rights is posed by the implicit presumption in § 3206 that, unless otherwise demonstrated, women under the age of eighteen are less capable than adults of making decisions regarding abortion in a reasoned manner. This presumption is not supported by the relevant empirical studies. To the contrary, there is a substantial and growing body of psychological literature which supports the view that by the age of fourteen, most minors do not differ from adults in their ability to understand and reason about treatment alternatives or to comprehend and consider risks and benefits regarding those alternatives. Nor do minors fourteen and older differ in the quality of decisions actually made. *See generally* Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis* in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES (G. Melton ed. in press); Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980).[20]

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[20] *See also* Melton, *Developmental Psychology and the Law: The State of the Act*, 22 J. FAM. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care* in CHILDREN'S COMPETENCE TO CONSENT (Melton, Koocher & Saks ed. 1983); Weithorn, *Developmental Factors and Competence To Make Informed Treatment Decisions*, 5 CHILD & YOUTH SERVICES 85 (1982); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982); Wald, *Children's Rights: A Framework For Analysis*, 12 U.C.D. L. REV. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. SOC. ISSUES 114 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. AM. ACAD. CHILD PSYCHIATRY 505 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOLOGY 412 (1978).

These findings tend to show that the years between 11 and 14 are the transition period during which children develop the capacity to weigh risks and benefits in decisionmaking.

Indeed, the fact that a minor has chosen to abort may show the deliberation, foresight as to consequences, and sense of responsibility that mark mature decisionmaking:

> Minors who seek abortions express reasons similar to those of adults, and demonstrate a comparable appreciation of their dilemmas. Like adults, they are attempting to escape from a potentially shattering, life-long handicap. These minors recognize that childbirth is age-inappropriate. They often wish to continue in regular junior or senior high schools without stigma rather than attend schools for pregnant girls, and some may have longer range ambitions as well. If they are members of fatherless families supported by public assistance, an unwanted pregnancy to term and childbirth may dash their hopes of rising above their mothers' education and socioeconomic status. They may be disillusioned by the inconstancy and unconcern of the biological father, often also a minor, or they may find their pregnancies repulsive as the result of incest or rape.

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251, 1256 (1980) (footnote omitted).

Thus, in view of the Court's reliance on minors' presumed "lesser capability for making important decisions" [21] as the primary justification for requiring women under the age of eighteen to secure parental consent or to initiate judicial proceedings by which they may demonstrate sufficient "maturity" to make an independent choice, these studies call for a re-evaluation of that presumption in order to ensure that the fundamental privacy rights recognized in *Roe v. Wade* are not being applied to minors in an impermissibly restrictive manner, unsupported by "any significant state interest . . . not present in the case of an adult." *Danforth*, 428 U.S. at 75.

As noted above, the "significant interest" recognized by this Court as sufficient justification of statutory

[21] *See supra* at p. 19.

parental/judicial consent procedures such as those at issue in *Thornburgh* is the State's interest in ensuring that a minor's decision to abort is the product of a mature and rational decisionmaking process. However, the studies cited above and at n.20, *supra*, show that there is no empirical basis for concluding that minors fourteen and older are less capable of making informed decisions than adults. Thus, the Commonwealth's interest in ensuring the informed consent of minors fourteen and older is no different from its interest in ensuring the informed decisionmaking of adults.

For example, in a recent study by two noted developmental psychologists, minors aged nine and fourteen and adults aged eighteen and twenty-one were presented with four hypothetical vignettes about individuals suffering from particular medical or psychological disorders, and were asked to choose among several treatment options. The subjects were presented with detailed information about the nature, purpose, risks, and benefits of the alternative treatments, and were asked to choose among them. The subjects were then asked a series of standardized questions about their decisions, and about the vignettes. In most instances, the responses showed no difference between the adults and the fourteen year olds in any of the scales of competency used in the study: inferential understanding (*i.e.*, appreciation), factual understanding, reasoning, reasonable outcome, and evidence of choice. *See* Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982).[22]

These and similar findings by other researchers support the conclusion that there is no factual justification for treating fourteen year old women differently, in this respect, from eighteen year old women. And, "without [the] assumption [of a minor's inability to make reasoned and informed decisions,] there seems to be an inadequate

[22] By contrast, the nine-year-olds were found to perform significantly less well on the understanding and reasoning scales.

constitutional justification for imposing upon her the burden of proving her entitlement to exercise a constitutional right." Dembitz, *supra*, 80 Colum. L. Rev. at 1262 (footnote omitted).

The statutory consent procedures required by § 3206 impose a substantial burden on adolescent women seeking to exercise the constitutional right to choose abortion. Without regard to how simple, uncomplicated, and speedy the procedures may be, or how helpful and courteous the court personnel may be, the burden imposed on a pregnant minor by the requirement that she initiate and prosecute such proceedings, exposing the details of her pregnancy to numerous court personnel, nevertheless remains a substantial burden. Because that burden is not imposed on adult women—individuals whose informed decision-making capacity is not measurably different from that of fourteen year olds—who exercise their right to choose abortion, the imposition of such procedures on minors constitutes an impermissible burden on their constitutional right.

The imposition of such a burden is particularly inappropriate in light of the "unique nature and consequences of the [minor's] abortion decision," which this Court has recognized as a characteristic that distinguishes "the abortion decision . . . from other decisions that may be made during minority." *Bellotti II*, 443 U.S. at 642. In addition to the adverse and substantial consequences noted by the plurality in *Bellotti II*,[23] there are a variety

[23] *See* 443 U.S. at 642:

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> Moreover, the potentially severe detriment facing a pregnant woman, see *Roe v. Wade*, 410 U.S. at 153, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

of other negative effects that result from requiring minors to submit to judicial proceedings to secure authorization for abortions. Those effects include self-imposed delays in initiating such proceedings because of embarrassment and the invasion of privacy inherent in petitioning a court; substantial increases in the psychological and medical risks of abortion which may result from such delays; anxiety, embarrassment, and feelings of degradation about discussing such intimate matters with a lawyer and a judge; and the damage to the minor's self-esteem and sense of individual personhood—the development of which are principal developmental tasks during adolescence—which necessarily results from the invasion of her privacy and the requirement that her abortion decision be reviewed and validated by a third party. *See generally* Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis*, *supra*.

In view of these considerations, the Commonwealth has failed to make the showing required by *Danforth* of a "significant state interest" in subjecting the abortion decisions of minors fourteen years of age and older to judicial review when similar decisions by adult women are not subject to judicial review. Accordingly, APA submits that the parental/judicial statutory consent provisions of § 3206 impermissibly burden the rights of women fourteen years of age and older to seek abortions, and respectfully urges the Court to hold § 3206 unconstitutional on that basis.[24]

[24] Consistent with these views, APA urges that States be required to *presume* that minors 14 years of age and older are competent to

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed as to §§ 3205 and 3210(b), and reversed as to § 3206.

Respectfully submitted,

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make their own abortion decisions. However, as with the presumption of an *adult's* competence to provide informed consent to health-care procedures, in circumstances in which the attending professionals have doubts as to the validity or reliability of the patient's consent, judicial or other third-party determination of the issue would be appropriate. Thus, any minor fourteen or older who is seeking an abortion and about whom health care professionals have serious doubt as to her competency to make an informed abortion decision would be required to petition the court for a *de novo* competency determination. As with existing procedures under § 3206, the judge would be permitted to consider whether an abortion would be in the minor's best interest only if he has made a prior determination of the minor's incompetency to make that decision for herself. Such a structure would protect fully the mature minor's constitutional right to an unburdened abortion decision, would serve the State's interest in protecting immature minors from "improvident" decisions, and would serve the additional salutary purpose of freeing judicial resources from difficult and unnecessary inquiries.

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Nos. 84-495 and 84-1379

IN THE

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RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*

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ALLAN G. CHARLES, *et al.*

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ORGANIZATION FOR WOMEN; HUMAN RIGHTS FOR WOMEN, INC.; EQUAL RIGHTS ADVOCATES; THE LEAGUE OF WOMEN VOTERS FOR THE UNITED STATES; NORTHWEST WOMEN'S LAW CENTER; NATIONAL WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST OF AMICI

This brief *amici curiae* is being submitted on behalf of the National Organization for Women (NOW), Human Rights for Women, Inc., Equal Rights Advocates, The

League of Women Voters for the United States, Northwest Women's Law Center, National Women's Law Center, NOW Legal Defense and Education Fund, and Women's Legal Defense Fund.[1] *Amici* are women's rights and civil rights organizations[2] whose constituencies and interests are seriously affected by the decisions in these cases. At issue is whether a woman's fundamental right to privacy in deciding whether or not to terminate a pregnancy will continue to be protected against undue state interference. *Amici* file this brief because of the extraordinary importance of this right to women, girls and their families.

INTRODUCTORY STATEMENT AND SUMMARY

As recently as 1983, in a series of cases involving state statutes and local ordinances restricting access to abortions, this Court reaffirmed that the fundamental constitutional right of privacy encompasses, and protects against undue governmental interference, a woman's right to make the highly personal choice whether or not to terminate her pregnancy. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983). The instant cases again present for this Court's review state legislation that attempts to restrict the exercise by women of this constitutionally protected right.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, No. 84-495, this Court is being asked to review the constitutionality of various sections of the Pennsylvania Abortion Control Act, 19 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983) ("Pennsylvania Act"),[3]

[1] Counsel for all parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

[2] Statements describing each organization appear in the Appendix to this brief.

[3] The Pennsylvania Abortion Control Act, at issue in *Thornburgh*, No. 84-495, was signed into law on June 11, 1982, prior to this Court's ruling in *Akron*. *See* Jurisdictional Statement at 8a-14a, *Thornburgh*, No. 84-495.

which require, *inter alia*, that the method used in performing abortions involving a viable fetus, absent "significantly greater" risk to the mother, be that most likely to result in live birth Section 3210(b)).[4] The Third Circuit held these provisions unconstitutional. Jurisdictional Statement at 43a-50a, 68a-71a, *Thornburgh*, No. 84-495 [hereinafter cited as *Thornburgh*, J.S.].

The Illinois Abortion Law of 1975, as amended (the "Illinois law"), at issue in *Diamond v. Charles*, No. 84-1379, makes it a felony for a physician performing an abortion involving a fetus that the physician knows has "a possibility . . . of sustained survival" to fail to exercise a certain standard of care toward the fetus and requires that doctors who prescribe certain types of birth control substances or devices inform their patients that they are being given "abortifacients."[5] The Seventh Circuit held both of these provisions unconstitutional. Jurisdictional Statement, Appendix at 32-43, *Diamond*, No. 84-1379 [hereinafter cited as *Diamond*, J.S. App.].

[4] Also presented for review are requirements that: two physicians be present at all abortions performed after viability; certain specified information be provided to all abortion patients; physicians and abortion providers submit reports on all abortions and facilities; minors seeking abortions obtain the consent of at least one parent or guardian; and, certain printed material discussing available social services and scientific information about the fetus be made available by the state. All of these provisions were struck down by the Third Circuit. Although *Amici* believe that all of these provisions are invalid and urge affirmance of the Third Circuit's decision, they will not address them further herein.

The Third Circuit also struck down the section of the statute requiring more expensive insurance premiums for health and disability policies that include abortion coverage. Appellants did not appeal this ruling.

[5] The statute also makes it a felony for a physician who performs an abortion involving a fetus "known to be viable" to fail to use the specified standard of care toward the fetus. The Seventh Circuit found this provision to be unconstitutionally vague. *Amici* urge affirmance of that finding, but will not address this provision further.

The right to privacy in the decision whether to terminate a pregnancy—the most profound and difficult of procreative and personal decisions—was first recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and strongly reaffirmed two years ago in *Akron*. None of the parties to these appeals have taken issue with this Court's holdings in *Roe* and *Akron*. An *amicus* brief filed by the Acting Solicitor General, however, urges this Court to reconsider and reverse *Roe v. Wade*. Amici submit that this attack is constitutionally flawed and blatantly hostile to the health and lives of girls [6] and women. The first section of this brief examines the arguments made by the Solicitor General urging reversal of *Roe v. Wade* and sets forth why those arguments are insupportable. *Roe v. Wade* must again be affirmed unequivocably.

In the second part of the brief, *Amici* consider the three statutory provisions identified above: the method of abortion (Section 3210(b)) provision of the Pennsylvania Act; and the standard of care toward a potentially viable fetus (Section 6(4)) and "abortifacient" (Section 11(d)) provisions of the Illinois law. As was recognized by the respective Courts of Appeals in their rulings on these cases, these three provisions impermissibly restrict the fundamental right of a woman to choose to have an abortion. *Amici* will argue below that these rulings should be upheld. These three provisions, as measured according to strict judicial scrutiny,[7] are unconstitutional.[8]

[6] Throughout this brief, any reference to women is intended to include girls as well, because the right to choose to have an abortion is of fundamental significance to any female of childbearing age. *See Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976). In 1981, 28% of all abortions—approximately 364,210—were performed on girls 19 years old or younger. Center for Disease Control, 33 *Morbidity & Mortality Weekly Report*, No. 26, p. 373 (July 6, 1984). In addition, in 1982, girls between the ages of 15 and 19 had 513,758 live births. National Center for Health Statistics, 33 *Advance Report of Final Natality Statistics*, No. 6, Supplement, p. 13, Table 2 (September 28, 1984).

ARGUMENT

I. A WOMAN'S FUNDAMENTAL RIGHT TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY—A RIGHT ESSENTIAL TO HER ABILITY TO CONTROL HER OWN LIFE—MUST BE PROTECTED FROM IMPERMISSIBLE GOVERNMENTAL INTERFERENCE.

A. The Supreme Court's Decision In *Roe v. Wade* Correctly Followed Well-Established Precedent And Should Be Affirmed.

Based on a long and compelling line of constitutional authority through which the Court endeavored to give meaning and substance to the concept of personal liberty guaranteed by the Constitution, this Court concluded in 1973 that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 152-56. Although the Court rejected arguments that the woman's right to choose an abortion is absolute, it deemed the right fundamental. *Id.* at 155.

Roe v. Wade follows this Court's prior rulings about the right to privacy. The right to privacy in family, marital and reproductive decisions has been, for many

[7] The strict scrutiny standard is called into play if two conditions exist. First, the obstacle to the exercise of the fundamental right must have been created by the government. *Maher v. Roe*, 432 U.S. 464 (1977). Second, the restriction must impinge upon the exercise of the fundamental right. *Danforth*, 428 U.S. 52 (1976). Since both conditions are present, the obstacles created by the Pennsylvania and Illinois statutes can stand only if justified by a compelling state interest narrowly drawn. *Roe v. Wade*, 410 U.S. 113 (1973).

[8] In both of these cases appellants raise jurisdictional issues, including whether or not the respective Courts of Appeals exceeded their proper scope of review. These issues, although important, are outside the specific interests of *Amici* and are not addressed herein.

decades, consistently protected by the Supreme Court. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The first of these privacy cases, *Meyer*, held that the 14th Amendment to the U.S. Constitution protects a zone of family and marital rights that are recognized as "essential to the orderly pursuit of happiness." The Court stated that

> [w]hile this Court has not attempted to define with exactness the liberty thus guaranteed, . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . . .

Id. at 399. Thus, fifty years before *Roe v. Wade*, this Court recognized that the Constitution protected the marital and family privacy of individuals from governmental intrusion.

The area of marital privacy was also protected by the Court in *Griswold*. In that case, the state of Connecticut made the use of contraceptives a criminal offense. The Court found that the statute was an unconstitutional invasion of privacy. Justice Douglas' majority opinion justified the constitutional right of privacy as a logical and necessary corollary of the specific guarantees of the Bill of Rights. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. (Citation omitted.) Various guarantees created zones of privacy." 381 U.S. at 484. The prohibition against contraception affected "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485. Citing *Boyd v. U.S.*, 116 U.S. 616, 630 (1886) and *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), this Court found that the Fourth and Fifth Amendments "create a zone of privacy," a right to be left alone by government

in marital and family relationships. *Id.* at 484-5. Finally, in concluding his opinion, Justice Douglas described the marital right of privacy as one that predates the constitutional framework itself:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school systems. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

In *Eisenstadt v. Baird*, this Court clarified the holding in *Griswold* by concluding that the right to privacy in making reproductive choices applied to single persons as well as to married couples. The Court held that dissimilar treatment of married and unmarried persons in limiting access to contraceptives violated the equal protection clause of the 14th Amendment. The Court concluded that there was no rational explanation for the different treatment of married and unmarried persons. The Court stated that, whereas in *Griswold* the issue was marital privacy, such privacy rights belong not to the couple as an entity, but to each member of the couple:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*

Eisenstadt, 405 U.S. at 453 (emphasis added). Thus, the Court established that the fundamental right to make

choices regarding one's reproductive life free of unwarranted governmental intrusion belonged to each *individual*.

The government claims that this Court's subsequent holding in *Roe v. Wade*, that the right to privacy encompasses a woman's right to decide whether to have an abortion, was a radical departure from historical constitutional precedent. This claim is patently false. While *Roe v. Wade* dealt with medical procedures that were unavailabe throughout much of the nation's history, and while the decision was this Court's first pronouncement on abortion, the decision nonetheless followed an established constitutional framework.[9] In asking for reversal of *Roe v. Wade*, while not questioning the right of privacy as a fundamental constitutional right, the government asks this Court for an illogical, nonsensical constitutional holding. As Justice Stewart noted in his concurring opinion in *Roe*,

> Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interest that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Id. at 170 (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (D.Conn. 1972)). The government's argument, if successful, would lead to the absurd conclusion that whether or not a child is taught German or French is a more intimate and private matter than whether or not one has a child at all.

The government's attack on *Roe*, for the most part, ignores the analytic framework of the privacy doctrine set out in *Griswold*, *Eisenstadt* and *Roe*. It does not consider what the right of privacy means or how it has developed through this Court's pronouncements over the past sixty-odd years. Thus, the government urges this Court

[9] *See* Heymann and Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. Rev. 765 (1973).

to abolish the privacy doctrine as it applies to abortions, but does *not* seek reversal of *Griswold* or *Eisenstadt*. Its brief in no way explains how the right to privacy can protect birth control usage and yet not apply to the right of women to determine whether or not they will carry a pregnancy to term. The Solicitor General claims, in a footnote, that the holding in *Griswold* was based on a concern that enforcing the statute would have required "governmental prying into the privacy of the home." Brief for the United States as Amicus Curiae at 28 n.6, *Thornburgh* and *Diamond* [hereinafter cited as S.G. Brief]. Outlawing abortion, the government claims, can be done without such "repulsive searches." *Id.* This statement betrays total contempt for the women who must make decisions about abortion. It totally disregards the gross invasion of privacy and repulsive seizure of the person implicated by governmental restrictions on abortion.[10]

The Solicitor General argues that the answer to whether *Roe* was correctly decided is to be found in the history of the due process clause of the 14th Amendment and the intentions of its framers. He relies on the premise that since the states were free to regulate, and prohibit, abortion in the 1860's, so should they be free to do so today. That premise totally disregards the differences between the legal and social status of women today, as compared to what it was in the middle of the Nineteenth Century.[11]

[10] The administration's interpretation of *Griswold* is highly inaccurate. *Griswold* protects intangible rights: the right of privacy, the right of marital intimacy. *Griswold* is by no means limited by this Court to protecting real estate from search. *See* Tribe, *The Supreme Court, 1973 Term—Forward: Toward A Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 17 & n.83.

[11] In the 1860's, women had few, if any, legal rights. *See generally*, L. Kanowitz, *Women and the Law—The Unfinished Revolution* (1969); L. Kanowitz, *Sex Roles in Law and Society* (1973). Given this historical fact, it is difficult to see how the intentions or contemplations of the men who enacted the 14th Amendment could in any way be relevant to its application to the legal rights of women today.

Moreover, with respect to the personhood of a fertilized ovum, history consistently demonstrates that no such personhood ever

The attack against *Roe* challenges the wisdom and appropriateness of the Court's conclusion that a woman's right to determine whether or not to terminate a pregnancy is fundamental and encompassed within the right to privacy.[12] The Solicitor General refers to an "instability in the law" [13] he says was caused by *Roe*, but ignores

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existed or was intended. In spite of broad prohibitions against abortion, exceptions always existed under most state laws on the grounds of the pregnant woman's health, fetal abnormality, rape or incest, etc. *See* Luker, *Abortion & the Politics of Motherhood* 32-33, 80-81, n.18 (1984). If the fertilized ovum is held to be a person by this Court, any such exceptions for therapeutic abortions would violate the 14th Amendment. *Roe*, 410 U.S. at 157, n.54. The embryo would then have a right to life *superseding* the life of the pregnant woman. Indeed, abortion would not be permitted to save the life of the pregnant woman. Thus, this Court wisely rejected the theory of embryonic personhood because it was entirely inconsistent with virtually all American abortion legislation at the time the 14th Amendment was adopted, as well as during prior decades and thereafter. *See* Luker, *supra*, at 11-39.

[12] It is important to note that this Court held in *Roe* that the woman's right to privacy in considering abortion is not absolute. *Id.* at 154. It must be balanced against important competing state regulatory interests. *See also*, Justice Burger's concurring opinion: "Plainly, the court today rejects any claim that the Constitution requires abortion on demand." *Id.* at 208. Sen. Humphrey's alarmist conclusion that *Roe* results in "abortion-on-demand" and prevents state prohibition of abortion "at any time during pregnancy," thereby permitting abortion "right up to birth" (Brief Amicus Curiae of U.S. Sen. Gordon J. Humphrey, et al. at 5-7, *Thornburgh* and *Diamond*), is therefore entirely false. This Court carefully considered the important fundamental right to privacy in making reproductive choices, but it also weighed the competing interests served by state regulation of abortion.

[13] S.G. Brief at 2 and 24. The Solicitor General also complains that courts have had difficulty in applying *Roe v. Wade*. *Id.* at 20. The basis for this assertion, however, is left unstated. *Amici* suggest that the statement merely reflects the administration's disagreement with the particular application made in *Roe* of the familiar constitutional doctrine underlying the right to privacy. Thus, it counters what is called the "extreme and unseemly hostility" of the courts below toward abortion regulation (S.G. Brief at 16) with arguments that ignore the fact that those courts, and this

the tyranny that existed before *Roe* when women could be, and were, denied the most basic measure of personal, bodily integrity and self-determination. Summary reversal of *Roe* would lead to extreme uncertainty on the part of medical professionals as to the legality of many standard medical procedures. It would result in a legal and health care crisis of nationwide proportions and in the injury or death of thousands of women and teenage girls.

The government argues, in effect, that the right of the state recognized in the funding cases to make policy judgments favoring childbirth over abortion [14] gives the state the right to intrude between a woman and her physician in determinations regarding appropriate medical treatment. Reference to the funding cases alone, however, ignores the important distinction, emphasized by the Court in both the decisions referenced by the government, between direct state interference with a protectd activity—the right to decide whether to terminate a pregnancy—and state encouragement of an alternative activity. *Maher v. Roe*, 432 U.S. 464, 473-75 (1977). The cases at bar involve direct governmental interference with the constitutionally protected right to decide whether to terminate a pregnancy. Thus, were the government's position accepted, the right of the state to favor childbirth would become the bludgeon with which a woman's right to personal liberty is destroyed. As Justice Douglas noted in his concurring opinion in *Doe v. Bolton*:

> Where fundamental personal rights and liberties are involved the corrective legislation must be "narrowly drawn to prevent the supposed evil" (citations omitted) and not be dealt with in an "unlimited and indiscriminate" manner. (Citations omitted.) Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.

410 U.S. 179, 216 (1973).

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one, are dealing with legislation that is designed to deprive women of the fundamental constitutional right to privacy.

[14] *See*, e.g., *Maher v. Roe*, 432 U.S. 464 (1977).

To abandon, as the government urges, the course taken in *Roe v. Wade* would render for women the constitutional guarantee of personal liberty an empty promise incapable of attainment. Speaking for the rights of women, those individuals who uniquely understand all of the interests at stake in the decision whether or not to terminate a pregnancy, *Amici* urge this Court to hold steadfast in its defense of the fundamental right recognized in *Roe* and affirmed in *Akron*.

B. The Right To Choose Abortion Is, In Essence, The Right To Control One's Life, Without Which Most Other Rights Become Meaningless.

If there is to be any re-examination of *Roe*, *Amici* urge that it be one which again acknowledges and affirms that the right of each individual woman to control her reproductive functions is nothing less than the right to control her own life. Indeed, "the right of a woman to determine her own reproductive life is a basic human right" [15] and it must be accorded constitutional protection commensurate therewith. If women do not have the right to terminate unwanted pregnancies, their rights to life, liberty, and the pursuit of happiness are virtually meaningless. They cannot participate as full and active members of society.

In *Roe*, Justice Blackmun touched upon the importance to women of the right to decide whether to terminate a pregnancy by referencing how pregnancy and maternity can affect a woman: higher mortality rates, physical and psychological harm, abandonment of educational plans, and loss of income and career opportunities.[16] *Roe*, 410 U.S. at 153. These factors, though they establish a compelling predicate for the right identified therein, present but a mere shadow of the fundamental personal and social interests at stake in the determination of who should have the right to control a woman's decisions re-

[15] Presidential Task Force of the Citizens' Advisory Council on the Status of Women, *Task Force Report on Family Law and Policy* 31 (1968).

[16] *See also, Doe v. Bolton*, 410 U.S. 179, 214-15 (1973) (Douglas, J., concurring).

garding her reproductive functions. Stated most concisely, denied the right to choose whether and when to bear children women will forever be denied full membership and participation in our society.[17]

To begin to appreciate the extent to which women's role in society has been narrowly limited by their reproductive functions one need look no further than the numerous and oft-cited pronouncements of this Court regarding the role of women in society, among the most notorious of which is as follows:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. And as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
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> . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained,

[17] *See* N. Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 Brooklyn L. Rev. 209, 214 (1974) ("[s]tereotyped sex-role assumptions are based ultimately on the core concept that woman's role is narrowly limited by her reproductive function.") and C. Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 Syracuse L. Rev. 565, 570-71 (1982). *See also*, Tribe, *supra* note 10, at 40, where in discussing whether a woman's husband should have the right to decide whether she may have an abortion, Prof. Tribe notes:

> To give men the unreviewable power to sentence women to childbearing and childraising against their will is to delegate a sweeping and unaccountable authority over the lives of others. Any such allocation of roles would operate to the serious detriment of women as a class, given the multitude of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society. Even a woman who is not pregnant would inevitably be affected by her knowledge of the power relations thereby created.

> even when like legislation is not necessary for men, and could not be sustained.

Muller v. Oregon, 208 U.S. 412, 421-23 (1908).[18] The resultant protections not only limited the hours women could work, but also the types of jobs they could obtain, the professions they could pursue and all nature of legal rights otherwise afforded men.[19] In this context, one can more clearly appreciate that the ability of women to control their own reproductive processes is of tremendous importance to the role women will play in society.

The immediate personal consequences of a return to the time when government was free to interfere with, and preclude, a woman's decision to terminate her pregnancy must also weigh heavily in the Court's consideration of this issue. Prior to *Roe* when abortion was illegal in most states unless necessary to save the life of the mother, it is estimated that between 200,000 and 1,200,000 illegal abortions were performed annually.[20] As one District Court

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[18] The statute before the Court in *Muller* limited the number of hours women could be employed for pay outside the home. Of course,

> [n]o law has ever attempted to prevent any woman, whether actually pregnant or one of the unmarried and sixty-year-old potential mothers of the race, from performing any amount of heavy work without pay. She may scrub floors . . . go into the field and replace a horse or hired man . . . with a full job of housework care for several young children all their waking hours . . . .

Note, *Constitutional Law—Regulation of Conditions of Employment of Women: A Critique of Miller v. Oregon*, 13 B.U.L. Rev. 276, 289 (1933).

[19] *See* generally, B. Babcock, A. Freedman, E.H. Norton and S. Ross, *Sex Discrimination and the Law, Causes and Remedies* (1975), pp. 4-53, 51-66; L. Kanowitz, *supra* note 11, at 31-38.

[20] W. Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (March 26, 1982). By comparison, in 1969, there were only approximately 22,000 reported legal abortions in the United States. By 1972, the number of legal abortions had increased to almost 600,000, and yet "the Center for Disease Control estimates that 130,000 women were unable to obtain legal abortions and resorted to illegal or self-induced procedures during that year."

observed in 1972, it was "common knowledge that if women cannot obtain (lawful) abortions . . . many (will) subject themselves to the notorious 'back-street abortion' . . . fraught with the myriad possibilities of mutilization, infections, sterility and death." *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (D.N.J. 1972). Estimates of annual deaths caused by illegal abortions were difficult to obtain due to the clandestine nature of such abortions. However, such estimates were as high as 5,000 to 10,000 deaths per year.[21] Other adverse health consequences, such as severe infection,[22] permanent sterility,[23] or other serious complications were, of course, even more frequent than death.

The tragic consequences certain to follow from denial to women of the right to legal, safe abortions have most recently been illustrated by events following this Court's decisions denying poor women the right to Medicaid funding for abortions.[24] Studies document the intense determination women have exhibited to control their own reproductive destinies, and the hardship, distress and human

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Alan Guttmacher Institute, *Abortion in the U.S.: Two Centuries of Experience*, 2 Issues in Brief, No. 4 at 3 (1982). Since 89% of the legal abortions performed in 1972 were performed in 17 states that had repealed or reformed their anti-abortion statutes, it is estimated that at least a third of the women who obtained legal abortions that year were required to travel outside their home state to do so, incurring significantly increased health risks and expense. *Id.* at 3-4.

[21] Bates and Zawadzki, *Criminal Abortion* (1964), p. 3-4.

[22] *See, e.g.*, Decker and Hall, *Treatment of Abortion Infected with Clostridium Welchii*, 95 Am. J. Obst. & Gynec. 394 (1966); Mortiz and Thompson, *Septic Abortion*, 95 Am. J. Obst. & Gynec. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J. AMA 805 (1967); Shenoi, Smits and Davidson, *Massive Removal of Small Bowel During Criminal Abortion*, 2 Brit. Med. J. 929 (1966); Studdiford and Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse*, 71 Am. J. Obst. & Gynec. 842 (1956).

[23] Rommer, *Sterility: Its Cause and Its Treatments* 59 (1952).

[24] *See Beal v. Doe*, 432 U.S. 438 (1977) and *Maher v. Roe*, 432 U.S. 464 (1977).

suffering endured by those for whom this right was substantially diminished by the funding decisions.[25] For the 37-year-old AFDC recipient who had 12 previous pregnancies and died of complications after attemping to abort herself with a glass thermometer and the pregnant teenage mother who shot herself in the stomach because she did not have the $600 necessary to pay for an abortion,[26] the absence of safe, legal, available abortion was a matter of life and death.

For all women, irrespective of financial or personal circumstances, the choice between abortion and childbirth may literally be a life or death decision. Between 1972 and 1978, a woman was approximately seven times more likely to die from childbirth than from legal abortion.[27] For abortions up to the 15th week of pregnancy, childbirth is 10 times more likely to result in death than is abortion.[28]

In no other situation has it ever been suggested that the government has the right and authority to demand, or any interest so compelling as to justify forcing, one person to risk their life for another, let alone for the mere potentiality that another person might one day come into existence. The government's position gives precedence to zygotes and embryos over living human beings. It values the existing lives of women less than the potential life within an embryo. It would subordinate the lives of women today and in the future to a single biological function, very much as they were subordinated 100 years ago. This Court recognized as much two years ago in *Akron*.

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[25] *See* Trussel, Menken, Lindheim and Vaughan, *The Impact of Restricting Medicaid Financing for Abortion*, 12 Family Planning Perspectives, No. 3 at 120 (May/June 1980). *See also, Women's Health Services, Inc. v. Maher*, 482 F. Supp. 725, 731 & n.9 (D. Conn.), vacated, 636 F.2d 23 (2d Cir. 1980) where the court cited evidence that indigent women could raise the money necessary for abortion only by denying themselves and their families the basic necessities of life.

[26] Trussel, *supra* note 25, at 129.

[27] Le Bolt, Grimes and Cates, *Mortality From Abortion and Childbirth*, 248 J. AMA 188 and 192 (1982).

[28] *Id.* at 196.

At that time, the Court specifically rejected the invitation to give preeminance to the state's interest in preserving potential human life or to measure abortion regulations under a rational basis test because to do either would be "wholly incompatible with existence of the fundamental right recognized in *Roe v. Wade*." *Akron*, 472 U.S. at 420 n.1.

The reality confronting the Court today is the same reality with which it dealt twelve years ago in deciding *Roe v. Wade*. The reality is whether a woman, about whose life and existence there can be no speculation, is entitled to protection from undue governmental interference in the most personal decision affecting her life and well being. As has been demonstrated since *Roe* was decided, it is possible to accommodate the state's interests in maternal health and potential life within an analytical framework that recognizes, affirms and protects the very real and personal right to privacy and liberty that is a cornerstone of our constitutional system. That right must, if it is to mean anything at all, encompass a woman's right to decide whether or not to carry a pregnancy to term. *Amici* urge the Court again to recognize and acknowledge, with at least the same concern afforded the state's interests, the fundamental interest of the woman involved in the abortion decision in exercising effective control over her reproductive functions and, in so many ways, over her very life itself. We urge affirmance of *Roe v. Wade*.

II. THE CHALLENGED PROVISIONS IMPERMISSIBLY BURDEN—AND IN SOME INSTANCES MAY EFFECTIVELY PREVENT—THE EXERCISE OF THE FUNDAMENTAL RIGHT OF A WOMAN TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY.

This Court repeatedly has held that a statutory scheme which infringes upon a woman's fundamental right to decide to terminate her pregnancy by abortion can survive constitutional scrutiny only if justified by a compelling state interest that is narrowly drawn to express the legiti-

mate state interests at stake.[29] *Roe v. Wade*, 410 U.S. at 155. The Court in *Roe* accepted the assertion by the State of Texas that there are legitimate state interests during the pregnancy in the health of the woman and in protection of potential fetal life.[30] Finding these interests to be separate and distinct, and conflicting with the woman's right to decide to terminate a pregancy, the Court divided pregancy into trimesters, defining the legitimate state interest, and, therefore, the parameters of state interference, at each juncture.

During the first trimester of pregnancy, neither the state's interest in the woman's health nor in potential fetal life can justify *any* state interference with the woman's right to decide. In the second trimester, state intrusion is permissible only if it promotes the state's legitimate interest in ensuring the woman's health. In the third trimester, the state's interest in the potential life of the fetus is sufficient to justify significant intrusion, even a total proscription of abortion, *unless* an abortion is necessary to preserve the life or health of the woman. *Roe*, 410 U.S. at 163-64. Thus, protecting the woman's health is the paramount state interest in the second and third trimesters of pregnancy. When measured against this interest, the challenged restrictions must fail, for they are nothing more than a thinly veiled attempt to limit the availability of abortions, in essence to accomplish through the back door what the Court forbade in *Roe*.

Consistent with the principles set forth in *Roe*, this Court and many others below have invalidated government imposed restrictions that ran afoul of the familiar and

[29] *See supra*, note 7.

[30] This Court declined to define the point at which life begins. "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. at 159. The Court rejected the attempt of Texas to define "life" as beginning at conception and thus to justify state interference throughout the pregnancy.

oft-applied strict scrutiny constitutional standard.[31] Most recently, the Court in *Akron* reviewed restrictive abortion regulations that imposed requirements ranging from hospitalization for post-first trimester abortions to disposal of the remains of an abortion in a "humane and sanitary manner." In its review of these enactments, the Court addressed itself to the validity of the basic *Roe* holding, and found compelling reasons to reaffirm that decision. *Akron*, 426 U.S. at 420 n.1.

The Court again accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.[32] Accordingly, the Court in *Akron* concluded that the government's interest in protecting maternal health did not justify a hospitalization requirement for all second trimester abortions, where that requirement "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." 462 U.S. at 438. The Court also found that the City's regulations governing "informed consent," which required doctors to provide each patient

[31] *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973) (requirement that all abortions be approved in advance by a hospital abortion committee); *Danforth*, 428 U.S. 52 (spousal and parental consent requirements); *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), aff'd mem. sub. nom. *Gerstein v. Coe*, 428 U.S. 901 (1976) (spousal and parental consent requirements); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980) (informed consent, 48-hour waiting period and parental notification requirements); *Women's Medical Center of Providence, Inc. v. Cannon*, 463 F. Supp. 531 (D.R.I. 1978) (requirement that physician's have certain hospital privileges); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D.La 1980) (post-first trimester hospitalization, presumptive viability, parental consent, informed consent and 24-hour waiting period requirements).

[32] The Solicitor General argues that *Akron* signaled a departure from the principles which guided the Court's previous abortion regulation decisions. He relies for this proposition, however, on statements from *Maher* and *Harris v. McRae*, 488 U.S. 497 (1980). Both of these cases involved government restrictions on medicaid funding for abortions, not direct state interference with the right to choose abortion. *See* discussion at pp. 10-11, *supra*.

information "designed not to inform the woman's consent but rather to persuade her to withhold it altogether," were an unconstitutional attempt "to extend the state's interest in ensuring 'informed consent' beyond permissible limits." *Id.* at 444.

The limitations on abortions imposed by the challenged restrictions in the two cases now before the Court attempt to circumscribe a woman's behavior and significantly impair the exercise of her fundamental right to decide whether to bear a child. These restrictions cannot be dismissed as "not burdensome or chilling." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66 (1976), *citing* 392 F. Supp. at 1374. Nor can they be characterized as merely "state encouragement of . . . childbirth," *Maher v. Roe*, 432 U.S. at 475, or described as placing "no obstacles in the pregnant woman's path to an abortion." 432 U.S. at 474. The statutory schemes enacted by Pennsylvania and Illinois forcefully interject government into a constitutionally protected decision-making process, riding roughshod over individuals' most private decisions. They are aimed at coercing a woman not to terminate her pregnancy by placing obstacles directly in her path.

By intruding directly into the decision-making process at critical points, the method of abortion requirements of the two statutes and the "abortifacient" provision of the Illinois law are intended to coerce and influence a woman to continue her pregnancy. The government seeks to do this irrespective of the reasons for the woman's own choices, and, most indefensibly, without regard to the fact that the pregnancy may be life endangering or health-threatening. These provisions all but preclude the physician's exercise of medical judgment and thus encumber the exercise of the woman's constitutionally protected right "by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice. . . ." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977) (quoted in *Akron*, 462 U.S. at 445).

A. Pennsylvania's Restriction On Abortion Methods Absent "Significantly Greater" Risk To The Mother Is Void For Vagueness.

Under Section 3210(b) of the Pennsylvania Act, *supra*, it is a felony for a physician performing an abortion on a fetus she has determined to be viable to fail to use the abortion technique "which would provide the best opportunity for the unborn child to be aborted alive unless, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique. . . ." The Third Circuit, relying on this Court's ruling in *Colautti v. Franklin*, 439 U.S. 379 (1979), held the section unconstitutional because it fails to require that maternal health be the physician's paramount consideration in the determination of which abortion procedure to employ. *Thornburgh*, J.S. 68a-71a.

In *Colautti*, the Court had before it certain portions of an earlier version of the Pennsylvania Act before the Court in *Thornburgh*. Section 5a of the predecessor statute required "the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother." *Id.* at 397. This section was found void for vagueness because it was "uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." *Colautti*, 439 U.S. at 400.

Both the Third Circuit and the district court recognized that the state could not constitutionally require the mother to be at any increased risk in order to save a fetus. *Thornburgh*, J.S. at 69a. They differed, however, in their respective interpretations of the term "significantly greater." The very fact of this difference supports the conclusion that the statute fails to give persons of ordinary intelligence notice of what conduct is forbidden by

the statute and is, therefore, void for vagueness. *See Colautti*, 439 U.S. at 390.

The constitutional standard in this situation, that the mother cannot be required to bear *any* increased risk for the sake of the fetus, is clear. The state easily could have adopted that standard, but chose instead to obfuscate. Use of the phrase "significantly greater," in light of the legislature's stated intent to mandate equality of rights between the mother and the fetus,[33] could only have been meant to require just exactly the trade-off prohibited in *Colautti*. The State's assertion that the provision comes into play "only if there is no meaningful difference in the risks" ignores the plain language of the statute and, in particular, the modification of "greater" by "significantly." This difference is illustrated by considering whether a reference to "any greater risk" means the same thing as a reference to "significantly greater risk." Clearly it does not. The decision of the Third Circuit striking this provision should be affirmed.

B. Section 6(4) Of The Illinois Law, Which Restricts Abortions Prior To Viability, Is Unconstitutionally Overbroad And Is Void For Vagueness.

Section 6(4) prescribes a standard of care for physicians performing abortions in cases where "there exists . . . a possibility . . . of more than momentary survival of the fetus. . . ."[34] Illinois law, *supra*, Section 6(4). This is identical to the standard of care required under Section 6(1) for fetuses known to be viable.[35] The statute imposes criminal sanction on the physician or assistant who intentionally breaches this standard of care. The Court of Appeals declared this statute unconstitutional because it seeks to regulate abortions on behalf of the fetus prior to viability and infringes on a woman's right to privacy. *Diamond*, J.S. App. 32-36. This decision should be affirmed.

[33] Section 3202(a) and (c) of Pennsylvania Act, *supra*. Brief for Appellants at 1a-5a, *Thornburgh*.

[34] In pertinent part, Section 6(4) requires the physician to "exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born . . . when there . . . exists . . . a possibility known to [the physician] of sustained survival[.]" Ill. Rev. Stat. Ch. 38 ¶ 81-26(4).

[35] The Court of Appeals held Section 6(1) was unconstitutionally vague because it failed to specify that the attending physician's determination of fetal viability was controlling, and failed to give physicians and their assistants explicit notice as to what the statute prohibited. *Amici* urge affirmance of this holding.

A viable fetus is one which is [capable] of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. In *Roe*, this Court recognized a compelling state interest in potential life at viability which permits the state to proscribe abortions altogether except when necessary to protect the life and health of the mother. 410 U.S. at 163, 164. Prior to viability, however, the state may only regulate the abortion procedure to the extent that such regulations are "reasonably related to maternal health." 410 U.S. at 164.

1. *Section 6(4) Is Unconstitutionally Overbroad Because It Seeks To Regulate Abortions Based On The State's Interest In "Potential Life" Prior To Viability.*

In *Danforth*, this Court struck down a statute which imposed on the physician a standard of fetal care applicable to all abortions on the ground that it was unconstitutionally overbroad. In pertinent part, the statute required the physician to use the same "degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." 428 U.S. at 82. This Court held that such a provision "impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy." 428 U.S. at 83. The State does not have a compelling interest in the fetus prior to viability and, therefore, may not regulate the abortion procedure on behalf of the fetus before via-

bility is reached. *Roe*, 410 U.S. at 164; *Danforth*, 428 U.S. at 82-83.

Similar restrictions were at issue in *Colautti*. There, the statute imposed a standard of care toward the fetus whenever the physician determined that the fetus was "viable" or "may be viable." 439 U.S. at 391. The Court held that the statute was ambiguous and therefore void for vagueness, because it concluded that "viable" and "may be viable" referred "to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and *Planned Parenthood*." *Id.* at 393 (footnote omitted). It did not decide, therefore, whether the provision also was overbroad. The District Court in *Colautti*, however, did consider the overbreadth issue. It held that the "may be viable" provision was a clear attempt by the state to regulate abortions during the second trimester, "when it may lawfully do so only in the interest of maternal health." 401 F. Supp. 554, 572 (1975).

The Seventh Circuit, rather than finding both Section 6(1) (governing a viable fetus) and 6(4) void for vagueness, upheld Section 6(1) and found Section 6(4) unconstitutionally overbroad. Assuming that the Seventh Circuit was correct in finding that the viability aspect of Section 6(1) is constitutional, the conclusion that Section 6(4) is unconstitutional necessarily follows. Section 6(4) can only be interpreted as intended to "carve out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability." *Colautti*, 439 U.S. at 393. Clearly, Section 6(4) is an attempt to whittle away the rights of the woman recognized in *Roe* and affirmed in *Akron*. It is, as appellants concede, an attempt to extend regulations to protect potential life earlier into pregnancy than can be justified based on any compelling interest.[36] As such, Section 6(4) is a blatant

[36] Appellants argue that even if the State's interest in the fetus is not compelling until viability, it is still substantial prior to viability. *Amici* submits that even if such an interest does exist, which we believe it does not, that interest is not sufficient to overcome the woman's fundamental right to determine whether or not to carry a pregnancy to term.

and impermissible attempt to circumvent the prior rulings of this Court. It cannot withstand the strict judicial scrutiny mandated by *Roe*. The decision of the Seventh Circuit must be affirmed.

2. *Section 6(4) Is Void For Vagueness.*

The ambiguity surrounding the "possibly viable" standard in the case at bar is identical to that "undefined penumbral" or "gray area" surrounding *Colautti*'s "may be viable" standard. *Colautti*, 439 U.S. at 391. This vagueness has a "chilling effect" on the willingness of physicians to perform second trimester abortions and risk criminal liability.[37] If upheld, it would eviscerate a woman's ability to exercise her fundamental right to decide to choose abortion.

A statute is void for vagueness if it fails to inform persons of ordinary intelligence what conduct it forbids. *United States v. Harris*, 347 U.S. 612 (1954). Particularly with respect to criminal statutes that abut fundamental constitutional rights and which, if unclear or imprecise, will inhibit the exercise of those rights, the State must proceed with clarity and precision. *See Colautti*, 439 U.S. at 390-92. Where it fails to do so, as in the case at bar, the statute is void for vagueness.

C. Sections 2(10) And 11(d) Of The Illinois Law Impermissibly Infringe Upon A Woman's Right To Privacy In Decisions Regarding Birth Control And Are Void For Vagueness.

Under the guise of protecting women from their physician's prescription of birth control substances or devices that they may not want to use, the State of Illinois made it a crime for a physician who prescribes or administers an "abortifacient" to fail to advise the patient that he

[37] *See* Affidavits of Allan G. Charles, M.D. and Martin Motew, M.D., *Diamond*, Joint Appendix at 3 and 54.

has done so. The statute defines "abortifacient" as "any instrument . . . known to cause fetal death . . . whether or not the fetus is known to exist when such substance or device is employed." Illinois law, *supra*, Sections 2(10) and 11(d).

With this regulation, Illinois adds a new dimension to the struggle to preclude women from exercising control over their own reproductive functions, and hence, their lives. Although the tactic they use may be new to this particular struggle, it is one with which women have much experience. It is one that suggests that women, for any number of reasons, need special protection to save them from disadvantage in their dealings with the world. Hence, we are told that women must be protected from doctors who would prescribe drugs or devices for them without first explaining to them the effect such instruments will have.

Not surprisingly, however the need for such protection arises only with regard to drugs or devices that operate to cause a fertilized ovum to be expelled from the woman's body; and only as to the effect such drugs or devices will have on the fertilized ovum—not the effect they may have on the woman. Thus, the physician who prescribes for a woman an intra-uterine device is compelled by special "protective" legislation to inform the woman that the device is an abortifacient that will cause expulsion of a fertilized ovum should one develop, but incurs no criminal liability for the failure to inform the patient that the device could render *her, the patient,* sterile and cause *her, the patient,* death.[38]

Thus, the Illinois abortifacient provision either is the type of protective legislation which for years protected only women's second class citizenship, and not women, or it is legislation designed to protect the fertilized ovum from inadvertent destruction. Given the legislature's

[38] *See* J. Williams, *Williams Obstetrics* 1024 (J. Pritchard and P. MacDonald 16th ed. 1980). Death from sepsis is noted as one of the complications that has been observed in connection with IUD use.

stated concern for "the unborn child . . . from the time of conception" and the compelling interest it claims in that "unborn child,"[39] it is clear that the focus of the state's concern in enacting these provisions was, in fact, the fertilized ovum and not the woman. From *Roe*, it is clear that the state has no compelling interest in such an organism. *Amici* submit, moreover, that the state has no legitimate interest at all in such an organism. Neither its concern for the fertilized ovum, nor any actual concern for the health of the woman, justifies the statute's invasion of the fundamental privacy rights that protect personal, procreative decisions from excessive governmental interference.

1. *The State May Not Regulate Abortion Based On The State's Theory Of Life.*

Section 11(d) requires physicians to advise their patients when, as defined in the law, they are prescribing an abortifacient for their patient. For all practical purposes, the only way a physician can be certain that she or he is complying with this statute is to explain to the patient, in the terms of statute, what it is they are prescribing. The fact that the statute does not specify in so many words the precise language to be used by the physician is, therefore, of little significance given the overall statutory framework. Problems will arise for the physician when she or he is asked to explain, as will surely happen, *what it means* to be told that an "abortifacient" is being prescribed. What it means, according to the statute, is that the drug or device will kill the patient's fetus, which the State believes is an unborn child. Thus, there is no escaping the conclusion that the statute does require the physician "to become the mouthpiece for the State's theory of life." *Charles v. Carey*, 627 F.2d 772, 789 (7th Cir. 1980). As such, it falls squarely within the bounds of this Court's rulings in *Roe* and *Akron* prohibiting such state interference with the woman's decision whether to terminate a pregnancy.

[39] *See* Brief of Appellants at 1a-2a, *Diamond*.

In addition, these provisions, like those defining "informed consent" in terms of specific information that must be provided by the physician to the patient, places the physician in the "undesired and uncomfortable straitjacket" about which this Court warned in *Danforth*, 428 U.S. at 67 n.8. The abortifacient provisions are simply another obstacle that the state wants to place in the physician's path in order to limit her or his discretion in advising a woman about her reproductive health needs. These provisions force the physician to accept definitions of medical and physiological terms on which, at the very least, there is no concensus.[40] What appellants describe as attempts to blur the distinctions between abortifacients and contraceptives[41] are in fact commentaries which reflect that all physicians do not agree that conception and pregnancy occur at the instant a sperm penetrates an ovum.[42] The physician who believes that conception occurs over time and that a woman is not pregnant until the fertilized ovum implants in the uterus must, nevertheless, advise the patient based on the state's theory of conception as occurring at a single point in time. This is exactly what the Court prohibited in *Danforth* and *Akron*. Thus, the "abortifacient" regulation must fall.

2. *The "Abortifacient" Provision Is Void For Vagueness.*

As set forth above, criminal statutes which threaten to inhibit the exercise of constitutionally protected rights

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[40] The evidence before the trial court included several physician's affidavits which stated, *inter alia*, that the definition of abortifacient in Section 2(10) is "medically unjustified," and "scientifically questionable." Affidavits of Drs. Charles, Zbaraz and Motew, Joint Appendix at 4, 22 and 50, *Diamond*.

[41] Brief of Appellants at 13 and n.6, *Diamond*.

[42] It has been noted that it is difficult to determine the incidence of spontaneous abortion since there is no agreement on when a pregnancy actually begins. It could be at almost any point between penetration of the ovum by a sperm to implantation of the blastocyst in the endometrium. *See* Williams, *supra* note 38, at 588. *See also*, *Roe*, 410 U.S. at 130-34 and n.22 and 159-62; and, Tribe, *supra*, note 10, at 18-21 and nn.86-94.

must be carefully and precisely drawn. Given the uncertainties that exist regarding "fertilization" and "conception" and how various methods of birth control actually work,[43] the subject provisions fall far short of minimum due process requirements.

At best, the statute is internally inconsistent. Abortion is defined as the intentional termination of a known pregnancy. Illinois law, *supra*, Section 2(6). Thus, if there is no known pregnancy, there can be no abortion. The statute, however, defines abortifacient as any instrument that would destroy the fertilized ovum, regardless of whether it was known to exist. *Id.*, Section 2(10). Assuming, as Appellants claim, however, that an abortifacient is something that causes an abortion [44] the statute's definition of abortifacient is completely at odds with the statute's definition of abortion.[45] One cannot cause an abortion unless there is a known pregnancy, and there is no known pregnancy at least until the process of conception is completed through implantation.[46] Thus, even as appellants and the Solicitor General[47] understand and explain these provisions, when taken together they do not make sense and cannot be justified on the ground of protecting women from abortions. So inconsistent a hodgepodge of medically insupportable and contradictory definitions upon which vague obligations are premised cannot possibly meet even minimal due process requirements, let

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[43] Williams, *supra* note 38, at 1012, indicates that most birth control pills act in multiple ways to prevent contraception, including preventing ovulation and/or implantation. Similarly, the contraceptive actions of intra-uterine devices "have not been precisely defined." Id. at 1021.

[44] Brief of Appellants at 11 and n.3, *Diamond*.

[45] See also physician's affidavits, *supra* note 40.

[46] Most pregnancy tests in clinical use are usually positive by the 3rd week after ovulation. Implantation of the blastocyst generally begins at the end of the first week after ovulation. Williams, *supra* note 38, at 170.

[47] *See* S.G. Brief at 14-15.

alone those imposed upon criminal statutes which infringe fundamental rights. Thus, the decision of the Seventh Circuit must be affirmed.

CONCLUSION

Amici urge this Court to affirm that the fundamental constitutional right of privacy protects the right of women to make reproductive choices without oppressive and burdensome state interference. Without this fundamental right women are denied the ability to control their own lives. We submit that the government's position not only is indefensible, but if accepted would have disastrous results for the lives and well-being of all American women. Thus, we urge the Court, once again, to affirm unequivocably its holding in *Roe v. Wade*. Furthermore, for the reasons set forth above, we urge the Court to affirm the decisions of the Third and Seventh Circuits regarding the method of abortion and abortifacient provisions of the respective state statutes.

Respectfully submitted,

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[48] Counsel wishes to acknowledge the assistance of Loren Chumley, a student at American University School of Law, in the preparation of this brief.

APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The NATIONAL ORGANIZATION FOR WOMEN (NOW) is a national membership organization of approximately 250,000 women and men in about 750 chapters throughout the country. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion. NOW believes that every woman has a fundamental constitutional right to decide whether to terminate her pregnancy by abortion. NOW submits that this fundamental right must be affirmed and that the restrictions challenged herein impermissibly impinge upon this constitutionally protected right.

HUMAN RIGHTS FOR WOMEN, INC. (HRW) is a non-profit organization dedicated to attaining equal rights for women in every aspect of life. The organization provides volunteer legal assistance in litigation involving rights of women; researches issues relevant to discrimination against women; and provides for educational projects on conditions of concern to women. HRW believes that laws which deny or severely limit the availability of abortion, such as those before the Court in these cases, deny women their right to self-determination as human beings.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through our particiaption as counsel and as *amicus* in numerous cases involving women's reproductive rights.

THE LEAGUE OF WOMEN VOTERS FOR THE UNITED STATES (LWVUS) is a national, nonpartisan,

non-profit membership organization, incorporated under the laws of the District of Columbia, with a current membership of 110,000 in 1,250 state and local Leagues in all states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS further believes that the *Roe v. Wade* decision is an important protection of this constitutional right.

THE NORTHWEST WOMEN'S LAW CENTER is a non-profit Washington State organization dedicated to securing equal rights for women through the law. The Northwest Women's Law Center provides the only sustained effort in the Pacific Northwest serving the legal needs of women from all socio-economic backgrounds. The Law Center has participated in significant cases before state and federal courts involving issues which have a major impact on women, and specifically has participated as *amicus curiae* in several cases which focused on the constitutionality of legislation hindering the exercise of a woman's right to decide whether to terminate a pregnancy.

THE NATIONAL WOMEN'S LAW CENTER is a Washington, D.C.-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe v. Wade* is of profound importance to the lives, liberty, health and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF has participated as *amicus* before this and other courts in several cases involving women's reproductive rights.

THE WOMEN'S LEGAL DEFENSE FUND (WLDF) is a non-profit, tax-exempt membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been discriminated against on the basis of sex. The right of women to decide for themselves whether or when to bear children is essential to women's achievement of full equality in our society. WLDF is committed to helping women achieve that equality and has participated as *amicus* before this Court and others in cases where the right to choose abortion has been challenged.

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Supreme Court of the United States.

OCTOBER TERM, 1985

No. 84-495
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APPELLANTS
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AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.
APPELLEES

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ALLAN G. CHARLES, ET AL.
APPELLEES

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS.

Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.) and Certain Other Members of the Congress of the United States in Support of Appellees.

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ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS.

Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.) and Certain Other Members of the Congress of the United States in Support of Appellees.

Interest of Amici.

Amici are 81 members of the Congress of the United States, as follows:

Rep. Gary L. Ackerman (D-N.Y.), Rep. Glenn M. Anderson (D-Calif.), Rep. Chester G. Atkins (D-Mass.), Rep. Les

AuCoin (D-Ore.), Rep. Howard L. Berman (D-Calif.), Rep. Anthony C. Beilenson (D-Calif.), Rep. Barbara Boxer (D-Calif.), Sen. Bill Bradley (D-N.J.), Rep. George E. Brown, Jr. (D-Calif.), Rep. Sala Burton (D-Calif.), Sen. John H. Chafee (R-R.I.), Rep. Cardiss Collins (D-Ill.), Rep. John Conyers, Jr. (D-Mich.), Rep. George W. Crockett, Jr. (D-Mich.), Rep. Ronald V. Dellums (D-Calif.), Rep. Julian C. Dixon (D-Calif.), Sen. Christopher J. Dodd (D-Conn.), Rep. Thomas J. Downey (D-N.Y.), Rep. Mervyn M. Dymally (D-Calif.), Rep. Bob Edgar (D-Pa.), Rep. Don Edwards (D-Calif.), Sen. Daniel J. Evans (R-Wash.), Rep. Lane Evans (D-Ill.), Rep. Dante B. Fascell (D-Fla.), Rep. Vic Fazio (D-Calif.), Rep. Barney Frank (D-Mass.), Sen. Barry Goldwater (R-Ariz.), Rep. William H. Gray, III (D-Pa.), Rep. Bill Green (R-N.Y.), Rep. Augustus F. Hawkins (D-Calif.), Rep. Charles A. Hayes (D-Ill.), Sen. Daniel K. Inouye (D-Hawaii), Sen. Nancy Landon Kassebaum (R-Kan.), Rep. Robert W. Kastenmeier (D-Wis.), Sen. Edward M. Kennedy (D-Mass.), Sen. John F. Kerry (D-Mass.), Sen. Frank R. Lautenberg (D-N.J.), Rep. Richard H. Lehman (D-Calif.), Rep. William Lehman (D-Fla.), Rep. Mickey Leland (D-Tex.), Rep. Sander M. Levin (D-Mich.), Rep. Mel Levine (D-Calif.), Rep. Mike Lowry (D-Wash.), Rep. Stan Lundine (D-N.Y.), Rep. Edward J. Markey (D-Mass.), Rep. Robert T. Matsui (D-Calif.), Rep. John R. McKernan, Jr. (R-Maine), Rep. Stewart B. McKinney (R-Conn.), Sen. Howard M. Metzenbaum (D-Ohio), Rep. George Miller (D-Calif.), Rep. Norman Y. Mineta (D-Calif.), Rep. Parren J. Mitchell (D-Md.), Rep. Jim Moody (D-Wis.), Rep. Bruce A. Morrison (D-Conn.), Rep. Robert J. Mrazek (D-N.Y.), Rep. Major R. Owens (D-N.Y.), Sen. Bob Packwood (R-Ore.), Rep. Claude Pepper (D-Fla.), Rep. Charles B. Rangel (D-N.Y.), Rep. Gus Savage (D-Ill.), Rep. James H. Scheuer (D-N.Y.), Rep. Claudine Schneider (R-R.I.), Rep. Patricia Schroeder (D-Colo.), Rep. Charles E. Schumer (D-N.Y.), Rep. John F. Seiberling (D-Ohio), Rep. Olympia J. Snowe (R-Maine),

Rep. Stephen J. Solarz (D-N.Y.), Rep. Fortney H. Stark (D-Calif.), Rep. Louis Stokes (D-Ohio), Rep. Gerry E. Studds (D-Mass.), Rep. Edolphus Towns (D-N.Y.), Rep. Robert G. Torricelli (D-N.J.), Rep. James A. Traficant, Jr. (D-Ohio), Rep. Morris K. Udall (D-Ariz.), Rep. Henry A. Waxman (D-Calif.), Rep. James Weaver (D-Ore.), Sen. Lowell T. Weicker, Jr. (R-Conn.), Rep. Ted Weiss (D-N.Y.), Rep. Alan Wheat (D-Mo.), Rep. Howard Wolpe (D-Mich.), Rep. Sidney R. Yates (D-Ill.).

As members of a co-ordinate branch of government, sworn to uphold the Constitution in the face of the most intense political controversy, *Amici* submit this brief[1] in the conviction that the vision of the judicial function and of individual liberty espoused by the Government in these cases is radically at odds with the written Constitution, with the position urged heretofore by the United States in this Court, and with the judiciary's traditional role as a principled and independent guardian of constitutional liberties.

Summary of Argument.

The Government, in urging that *Roe* v. *Wade* be overturned, has taken an extraordinary and unprecedented step. For the first time in the history of the Solicitor General's office, in a case in which the United States is not even a party, and a case in which the issue was not presented by the parties, the Department of Justice has urged the repudiation of a liberty long since declared fundamental by this Court.

The Government would have the Supreme Court toss into the political arena the right to choose between childbirth and abortion. For little reason beyond the indisputable difficulty of the issues posed and the intense controversy invited, the Government would relegate this delicate constitutional matter to shifting political majorities in the 50 state legislatures, yielding a bizarre quilt of wildly varying state laws. Whatever

[1] Counsel for all parties have consented to the filing of this brief. Letters indicating consent have been filed with the Clerk.

rights women might have in this matter would be disregarded in some states; whatever rights the unborn are thought to possess would be ignored in others. On a previous occasion when the nation was deeply divided over a different issue of fundamental liberty, Abraham Lincoln warned that the Union could not long endure "half slave and half free."[2]

The Government's ill-conceived resolution of the abortion controversy would not only fragment our constitutional order but turn it on its head. For it is precisely the task of this Court to insulate conflicting claims of individual right from the changing winds of politics. As in the case of school desegregation, it is often when public sentiment is most sharply divided that the independent judiciary plays its most vital national role in expounding and protecting constitutional rights. As the Chief Justice wrote in *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 300 (1955), "[t]he vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them."

Argument.

1. Only recently, in *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued — with extensive briefing — the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal

[2] Speech in Springfield, Illinois (June 16, 1858).

> choice whether or not to terminate her pregnancy. *See Connecticut* v. *Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Harris* v. *McRae*, 448 U.S. 297 (1980); *H.L.* v. *Matheson*, 450 U.S. 398 (1981).

In the name of "democratic self-governance,"[3] and in supposed analogy to this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Government — which had urged *stare decisis* in *Garcia* — now invites this Court to overrule *Roe* v. *Wade*, 410 U.S. 113 (1973). In so moving, the Government describes that decision as merely another "formulation affecting the allocation of constitutional powers" that has supposedly "proven 'unsound in principle and unworkable in practice.'" GB 21. But the Government adduces no relevant consideration that was not available in 1973[4] and points to no relevant development subsequent to *Akron* in 1983. More importantly, the Government's decision to treat the holding in *Roe* v. *Wade* as effecting only an "allocation of constitutional powers" utterly fails to distinguish between determining the proper distribution of power within government and defining the boundary that

[3] Government Brief ("GB") at 1.

[4] The protracted controversy to which the Government points hardly distinguishes the current situation from that which the Court confronted as early as 1973. Nor does the Government explain why a judgment made by application of fundamental constitutional principles should yield in the face of a measure of public dispute, or suggest how overruling *Roe* v. *Wade* could be expected to replace controversy with consensus.

separates the sphere of governmental power from the sphere of individual autonomy.

2. Stripped to its essentials, the Government's contention is that state legislatures should be accorded judicially unrestricted latitude in defining — and, if they choose, infringing — fundamental rights in this area. The "efforts of . . . state legislatures to balance the competing interests at stake in the abortion decision," GB 1, are described as though fundamental rights could properly be reduced to political interests. That may well be the case under a parliamentary government where the legislative will is supreme,[5] but it ignores the choice of a fundamentally different form of government that was made for us nearly two centuries ago:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.[6]

[5] "The primary argument against a Bill of Rights [for Great Britain] is that it would . . . remove from Parliament a decision-making capacity which rightly belongs to Parliament. Disputes as to encroachments on fundamental rights are essentially political disputes and must be resolved politically, not judicially." P. Norton, *The Constitution In Flux* 253 (1982).

Our entire history has made clear that, where controversy is greatest, so also are the dangers of majoritarian excess and the need for protection under the Constitution by an independent and principled judiciary. *See, e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *New York Times* v. *United States,* 403 U.S. 713 (1971); *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

3. There is no claim that the deference to state legislatures for which the Government here clamors should be limited to abortion cases; nor could any such argument be made. The force of the Government's current analysis would be fully applicable whenever this Court is called upon to enforce constitutional rights on a case-by-case basis, and to draw the ever-finer lines that are necessitated by recurring instances of state or local resistance. In effect, the Government's position applies to constitutional rights to attend an integrated public school; to express unpopular political views; to decide whether to use contraception or, in consultation with a doctor, terminate a pregnancy. In each of these — and other — instances of constitutional liberties, the Government would evidently vest state and local legislatures with substantial power to define, or to ignore, the meaning of the United States Constitution.

The Government adduces no principled distinction between any of these fundamental rights and the fundamental right of privacy, for which the Government here urges a new federalism. Indeed, the more controversial the particular exercise of rights, the more willing the Justice Department seems to relegate the meaning of the Constitution to the state legislatures. This cannot be what the constitutional framework mandates.

4. In this case, like *Akron,* the litigants initially called upon this Court only to construe, not reexamine, *Roe* v. *Wade* itself.

[6] *West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638, 639-640 (1943).

But here, in contrast to its position in *Akron*,[7] the Government nonetheless urges such reexamination. It is perhaps unsurprising that a controversial precedent would be selected to carry this gratuitous plea for radical surgery on our form of government. But the results of such surgery would be felt throughout the body politic. For it is axiomatic that the undoing of one aspect of fundamental liberty threatens the protection of individual rights in every phase of American life. However desirable it might be for the states to experiment with traffic laws or liquor regulations or other quotidian matters, any "experiment" with our most basic liberties, as James Madison counseled two centuries ago, is cause only for immediate "alarm."[8]

5. The Government's current position invites just such an experiment — on the supposed authority of *Garcia*, even though the issue here is one readily distinguishable from anything at issue in *Garcia*. For that decision dealt only with "the allocation of constitutional powers" *within* government — *not* with the underlying distribution of power *between* government and the individual. Thus, in *Garcia*, this Court engaged in lively debate over the question of whether and to what degree the rights of *states*, as distinct from those of individuals, could properly be left to the national legislature for protection, relying on "the built-in restraints that our system provides through state participation in federal governmental action [to ensure] that laws that unduly burden the States will not be promulgated"

[7] In argument before this Court in *Akron*, the Solicitor General expressly refrained from asking the Court to overrule *Roe* v. *Wade*:
Question: Mr. Solicitor General, are you asking that *Roe* v. *Wade* be overruled?
Mr. Lee: I am not, Mr. Justice Blackmun.
Question: Why not?
Mr. Lee: That is not one of the issues presented in this case, and as amicus appearing before the Court, that would not be a proper function for us. Tr. Oral Arg. p. 21.

[8] J. Madison, "Memorial and Remonstrance Against Religious Assessments," in *Everson* v. *Bd. of Education*, 330 U.S. 1, 65 (1947) (Appendix, Rutledge, J., dissenting).

in the first instance. 105 S.Ct. at 1020 (majority opinion). *Cf. id.* at 1025-26 & n.9 (dissenting opinion). But it was common ground for this Court in *Garcia* that no such question could even arise with respect to the rights of *individuals*: "One can hardly imagine this Court saying that because Congress [or a state legislature] is composed of [or represents] individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process." *Id.* at 1025 n.8 (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ., dissenting).

The repudiation of *National League of Cities* in *Garcia* represented only a determination that, with respect to the sovereign rights of *states*, this Court should return to its pre-1976 tradition of depending — within certain still-to-be elaborated "affirmative limits," *id.* at 1020 — on "the structure of the Federal Government itself" to defend the Constitution's boundaries on national legislative authority. *Id.* at 1018. Whether that determination was right or wrong, it bears no resemblance to the truly extraordinary suggestion that, with respect to the rights of individual *persons*, this Court should inaugurate the practice of depending on "ordinary politics . . . to settle disputes of value and vision" going to the very *content* of what those individual rights *are*. GB 30. Far from restoring to Congress this Court's long-standing allocation of responsibility for the claims of states *qua* states, the proposed overruling of *Roe* v. *Wade* would rest on a wholly novel investiture in state legislatures of an essentially unreviewable power to dispose of the competing claims of right advanced by individuals under the fundamental right of privacy — an investitute utterly alien to our Constitution.

6. To be sure, this suggestion is couched in the form of an ostensibly modest recommendation that this Court "return the law to the condition in which it was before *Roe* v. *Wade* was decided." GB 24. But that simply begs the question. For, unless the "condition" of the law, prior to the 1973 abortion

decision, indeed entrusted state legislatures with judicially unreviewable and constitutionally unfettered control over personal matters of family composition and reproductive choice, what the Government proposes would *not* be merely a restoration of the *status quo ante* but a revocation of the very principles from which *Roe* v. *Wade* sprang. For the Court now to overrule *Roe* v. *Wade* would then be not just "a significant step backwards," *cf. Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), but a repudiation of the 50-year path along which this Court located its 1973 abortion ruling.

7. The central question to be addressed, then, is whether an overruling of *Roe* v. *Wade* would, as the Government asserts, merely turn the clock back to 1973 by erasing what it calls "an erroneous point of departure," GB 2, from the "generally propitious journey," *id.*, along which constitutional law had traveled up to 1973 — or whether *Roe* v. *Wade* was instead a natural step along that journey,[9] so that its overruling would entail a far more substantial retreat, propelling the Court and the country onto a legal landscape from which not only *Roe* but many of its important antecedents, and the protections they provide for us all, would tragically be absent.

8. That *Roe* was indeed a natural outgrowth of a gradual process of legal evolution can hardly be doubted. Its origins, as the Court made clear in the *Roe* opinion, included a series of landmark Supreme Court rulings affirming for all of us the liberty to decide for ourselves when and whether to marry, *see Loving* v. *Virginia*, 388 U.S. 1 (1967), how to raise and educate our children, *see Meyer* v. *Nebraska*, 262 U.S. 390

[9] The carefully selected citations of academic commentators on *Roe* v. *Wade*, see GB 24 n.4, certainly do not show the contrary. The "broad spectrum of constitutional scholars" said by the Government to share its "judgment" that *Roe* v. *Wade* rested on a "basis . . . so far flawed that this Court should overrule it," *id.* (footnote omitted), is particularly misleading in its calculated exclusion of all the scholars who have written in support of the basic holding in *Roe*.

(1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and how much of our most personal lives to disclose to the world, *see Katz* v. *United States*, 389 U.S. 397 (1967), as well as the right to decide whether to conceive or bear children, *see Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). These decisions comprehensively protect our rights both to be left alone by government and to choose how to conduct our own lives. To overturn *Roe* v. *Wade* as the Government urges thus would turn the clock back not just to 1973 but to a point prior to 1923; it would not only deprive women of their fundamental liberty, but would also cast into grave doubt the continuing validity of every one of the Court's half-century of privacy decisions, which protect us all.

9. To resist this conclusion, the Government suggests that *Roe* v. *Wade* represented an unwarranted leap beyond the many "'privacy' cases that the Court cited" in that decision. GB 28. The inference is that the Court could simply jump back to the point from which *Roe* had supposedly "leapt." But the "story" the Government would have the privacy cases tell, *id.* at 27 — in contrast to the message this Court read in them — is strange indeed. As the Government would have it, for example, this Court's 1965 decision striking down a state ban on contraception, *Griswold* v. *Connecticut*, 381 U.S. 479, represented little beyond judicial protection of the "'privacy of the home.'" GB 28 n.6. The Government has evidently mistaken Justice Douglas' evocative language in *Griswold* — "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[10] — for the actual holding in that case. It has long been understood that even the Fourth Amendment, into whose Procrustean bed the Government seeks to shove *Griswold*, "protects people, not places," *Katz* v. *United States*, 389 U.S. 347,

[10] 381 U.S. at 485.

351 (1967). And even before *Katz* was decided, this Court recognized in *Griswold* itself that what was being protected was not the sanctity of the suburban bedroom, but the "intimacies of the marriage relationship." 381 U.S. at 502-03 (White, J., concurring); *see id.* at 482, 486 (opinion of the Court); *id.* at 486, 495 (Goldberg, J., concurring).

Even if we accept *arguendo* the Government's misreading of *Griswold*, the Government still cannot simultaneously defend that case and urge that this Court cede to state legislatures a judicially uncontrollable power to prohibit all abortion, from the "moment" of conception, whether performed surgically or through the use of "a substance or device" that operates as an "abortifacient." GB 14. Any such power, notwithstanding the Government's bald assertion to the contrary, would necessarily entail an even greater risk of the "repulsive searches," GB 28 n.6, that the Government adduces in support of this Court's holding in *Griswold*. *Roe* relied heavily on *Griswold* in no small part because of the "problems . . . posed . . . by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event, and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and even artificial wombs." 410 U.S. at 161 (footnote omitted). In the biological context of human conception, state efforts to ferret out prohibited abortions — as defined by the Government — would require not only searches of bedrooms for telltale "morning-after" pills, but also searches of women's bodies for intrauterine devices or other birth control technologies that operate during or after fertilization.

10. In any event, the Government's absurdly narrow conception of privacy is flatly at odds with this Court's unbroken line of precedent. No risk of overbearing searches was entailed in *Griswold's* other direct progeny, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), which the Government oddly describes as merely applying "accepted principles . . . of equal protection,"

GB 29 (footnote omitted),[11] and *Carey* v. *Population Services International*, 431 U.S. 678 (1977), or in the other antecedents of *Roe* v. *Wade* — the decades of decisions, beginning as early as 1923 and continuing through the 1960s, establishing a sphere of individual freedom over intimate matters of reproduction, parenting, and family structure. The Government's efforts to sweep these long-standing precedents under the rugs of equal protection and freedom of expression, GB 29, must, with all respect, be described as ill-informed or worse. For nothing in the demand that government rule impartially, or in the requirement that it tolerate dissent, could remotely explain this Court's unbroken line of holdings, both before *Roe* v. *Wade*[12]

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[11] *Baird* struck down a state statute making it illegal for single persons, but not for married persons, to obtain contraceptives in order to prevent pregnancy. Virtually every commentator on the case, including the very authors the Government cites in its brief, *see* GB 24 n.4, has recognized that *Baird* cannot be defended in standard "equal protection" terms but rests unavoidably on the premise that there exists a special freedom to obtain and use contraceptives — a freedom that goes beyond both the marital relationship and the privacy of the home. *See, e.g.*, J.H. Ely, *Democracy and Distrust* 126 n. (1980); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 34-36 (1972); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L. J.* 221, 296-97 (1973). To describe this case as a standard application of settled equal protection principles is to ignore this analysis — and to ignore the Court's own words in *Baird*: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis in original).

[12] To dismiss such decisions as *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), for example, as simple First Amendment cases, *see* GB 29 n.8, is little short of astonishing. The First Amendment had not yet been applied to the states when those opinions were written; their explicit invocation of parental and family autonomy, rather than freedom of expression, to explain the Court's invalidation of state laws interfering with the education and upbringing of children was properly stressed as decisive by Justice Harlan in his landmark analysis of *Meyer* and *Pierce*. See

and after,[13] unless one were to posit judicially enforceable rights of individuals and families to shape their future, to determine their composition, and to decide whether to bring children into the world — even when local or statewide political majorities would decree different choices.

11. That these rights may be no more than "implied and inchoate" in the Constitution's text, structure, and history, GB 27, and may not be as "directly rooted in textually specified constitutional values" as are some other rights, *id.* at 28, is beside the point in a Constitution whose very text specifies that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Amendment IX. Indeed, the position the Government invites this Court to take would directly violate the rule of construction mandated by the Ninth Amendment.

12. That the Constitution's text provides, in its "liberty" clause, the essential starting point for the judicial development of the series of rights this Court has protected from 1923 through *Roe* and beyond is not open to dispute. Thus, as the Government recognizes, "[t]he ultimate textual source for *Roe* v. *Wade* . . . is the Fourteenth Amendment's guarantee: 'nor shall any State deprive any person of . . . liberty . . . without

Poe v. *Ullman*, 367 U.S. 497, 550-52 (1961) (dissenting opinion). And to dismiss *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), as just another equal protection case, *see* GB 29 n.7, is hardly less remarkable, given the *Skinner* Court's explicit reliance upon reproductive freedom as "one of the basic civil rights of man," 316 U.S. at 541, in justifying its unusually strict scrutiny of the Oklahoma criminal sterilization law's distinction between larcenists and embezzlers.

[13] *See, e.g., Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (relying on *Meyer, Pierce, Skinner, Griswold,* and *Roe* to invalidate a zoning law that interfered with a grandmother's choice to live with her grandson); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974) (relying on *Meyer, Pierce, Skinner, Griswold, Baird,* and *Roe* to invalidate an employment restriction operating against pregnant women and thus burdening the woman's decision to bear a child).

due process of law.'" GB 25. In this majestic command the Government sees no "apparent textual meaning" beyond a prohibition against "government's actually taking hold of a person, as to confine him, without fair procedures." *Id.* That criminal prohibitions upon abortion "actually take hold of" a woman's person — her body, her life — and, in the most literal sense, confine her "liberty," cannot be doubted. And that "due process of law" requires more than "fair procedures" whenever the state acts to confine a person's basic liberty was accepted even by the Justices who dissented in *Roe* v. *Wade*[14] — and indeed has been accepted by the entire Court ever since the late 19th century.

13. So too, the fact that "state laws condemning or limiting abortion were very general at the time the Fourteenth Amendment was adopted," GB 25, even excusing the exaggeration,[15] would no more immunize such laws from Fourteenth Amendment scrutiny than the general acceptance of state laws segregating the races in public schools or in marital relations at the time of the Fourteenth Amendment's adoption immunized *those* laws from such scrutiny. *See Brown* v. *Bd. of Educ.*, (*Brown I*), 347 U.S. 483 (1954); *Loving* v. *Virginia*, 388 U.S. 1 (1967).[16]

[14] *See, e.g., Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting but agreeing that the "due process clause . . . undoubtedly does place" substantive limits on "legislative power" to ban abortions); *Griswold* v. *Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment).

[15] *See Roe*, 410 U.S. at 138-39.

[16] *See also City of Cleburne, Tex.* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3268-69 (1985) (Marshall, Brennan and Blackmun, JJ., concurring in part and dissenting in part): "Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare

14. Nor is there any substance to the Government's argument that the very lines this Court has drawn in the course of elaborating the basic right upheld in *Roe* v. *Wade* somehow demonstrate that the issues posed are unfit for judicial determination. *See* GB 20-23. Once it is agreed, for example, that a law prohibiting "abortion even where the mother's life is in jeopardy" would violate the Fourteenth Amendment, *see Roe* v. *Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting), this Court can find no escape from drawing complex lines between permissible and impermissible abortion prohibitions. Differences will remain over *where* this Court should draw those lines, but the only way to extricate the Court from the entire line-drawing enterprise is to hold that federal courts must accept as conclusive any legislature's determination that any given restriction of abortions serves legitimate purposes that warrant the resulting intrusion upon liberty. Whether or not, as the Government asserts, those who wrote and ratified the Fourteenth Amendment "would have been surprised . . . to learn that they had put any part of such subjects beyond the pale of state legislative regulation," GB 26 — a position never taken by this Court — surely the Amendment's authors would have been shocked to learn that they had put any major sphere of human liberty beyond the pale of federal judicial protection.

15. The Government's most telling point with regard to the line-drawing *Roe* has required seems to be that such notions as fetal "viability" reflect considerations of a medical or technical sort more suitably addressed by legislatures than by courts, particularly since "[t]here is no obvious constitutional connection between the ability of a fetus to survive outside the

Plessy v. *Ferguson*, 163 U.S. 537 (1896), and *Bradwell* v. *Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) with *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954) and *Reed* v. *Reed*, 404 U.S. 71 (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests. . . ."

womb, and the magnitude of a state's lawful concern to protect future life." GB 22. But that misses the entire point of what this Court held in *Roe* v. *Wade*: there *is* an obvious constitutional connection between the ability of a fetus to survive outside the womb and the nature of a woman's right to decide whether to bear a child. For it is *only* with respect to a fetus that is not yet viable that a ban on abortion compels a woman to dedicate her body and future to the survival of the unborn. And the fact that "viability" is a moveable point that "changes with advancing technology," GB 23, far from making the Court's standard "unworkable" or "disturbing," *id.*, has long helped to justify *Roe* v. *Wade's* trimesterization against the charge that it represented an arbitrary exercise in judicial line drawing. Thus, it has been clear since the time *Roe* was decided that, to the extent society as a whole becomes willing to invest sufficient resources in the protection of the unborn and newly born — a willingness likely to be reflected by the advancing line of viability — *Roe* might permit greater state protection of the fetus to follow. Seen in this light, *Roe* has from the outset reflected not so much an absolute rejection of the sanctity of "life" from the moment of conception as a structuring of how a value choice on that subject may be made consistent with constitutional principles. Society's claim of a constitutionally dominant interest in fetal life is made commensurate with society's genuine and general exertion to further that interest — not with its willingness to give the interest token recognition by legislatively condemning women to bear unwanted children or to abort under hazardous and illegal conditions.[17]

[17] *See* Tribe, "Structural Due Process," 10 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 269, 297 (1975). More generally, in defining "limits [that] leave the individual a significant private sphere to live his life," the standards one evolves, rather than being "fixed and neutral," might *have* to draw on "the changing political and economic arrangements of the subject society. . ." Fried, "Is Liberty Possible?" *III The Tanner Lectures on Human Values* 100, 109 (1982). As Professor Fried correctly noted in 1982, "it is a serious mistake to be disturbed by this." *Id.* at 109.

Conclusion.

In dramatizing its plea that *Roe* v. *Wade* be buried by this Court, the Government exhumes the ghost of *Lochner* v. *New York*, 198 U.S. 45 (1905), *see* GB 29, but nowhere explains why it deems the right to decide whether to bear and beget a child to be indistinguishable from the right to hire another for a substandard wage. In citing Justice Holmes' aphorism in *Lochner* that the Constitution is "made for people of fundamentally differing views," and that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," 198 U.S. at 76 (dissenting opinion), the Government conveniently omits Justice Holmes' closing caveat: "unless . . . the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id*. Statutes unduly restricting a woman's ability to decide whether or not to bear a child do infringe precisely such "fundamental principles." Accordingly, *Roe* v. *Wade* — a decision entirely faithful to that tradition — should be followed in the cases currently pending before this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,

Appellants,

—VS.—

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE PENNSYLVANIA CIVIL LIBERTIES UNION AND THE ANTI-DEFAMATION LEAGUE

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with more than 200,000 members dedicated to defending the Bill of Rights. The ACLU established the Reproductive Freedom Project in 1974 to protect a woman's fundamental right to privacy and reproductive freedom. The ACLU believes that each woman has a fundamental right to choose to terminate her pregnancy by abortion, guaranteed by her constitutional rights of privacy, equal protection, and religious freedom, and has participated either as *amicus* or party's counsel in every abortion case before this Court.

The Pennsylvania affiliate of the American Civil Liberties Union has throughout the last decade worked to protect the right of women to privacy and reproductive freedom. This affiliate is presently challenging Pennsylvania's Medicaid funding cut-off for abortions and has succeeded in securing a governor's veto of a bill which would have closed the courts to any suit against a doctor for failing to inform the patient of the likely consequence of carrying a pregnancy to term.

The Anti-Defamation League of B'nai B'rith was organized as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races and to secure justice and fair treatment for all. The Anti-Defamation League is vitally interested in protecting the freedom of conscience of all persons and all other freedoms consistent with an open, democratic society. In this spirit, the Anti-Defamation League has previously filed *amicus* briefs in such landmark civil liberties cases as *Brown v. Board of Education*, 347 U.S. 483 (1953), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

All parties have given their consent for the filing of this brief in letters filed with the Clerk of this Court.

ARGUMENT

I. THE REQUIREMENTS IMPOSED BY SECTION 3210(B) PERTAINING TO CHOICE OF METHOD AND STANDARD OF CARE FOR THE FETUS WILL JEOPARDIZE THE LIFE AND HEALTH OF WOMEN WHOSE NEED FOR POST-VIABILITY ABORTIONS IS UNQUESTIONED.

A. Post-Viability Abortions Occur In Highly Individualized Situations Involving Serious Health Problems.

The statutory requirements of § 3210(b) of the Pennsylvania Abortion Control Act, 18 Pa. Const. Stat. Ann. §§ 3201-3220 (Purdon 1983) apply only to post-viability abortions which a physician has certified to be necessary for the preservation of the pregnant woman's life or health. As such, their impact is limited in number but enormous in consequence.

Since abortion became legal nationwide in 1973, most women have been able to make their abortion decisions earlier and earlier in pregnancy.[1] Today, 99 percent of all abortions are performed in the first 20 weeks of pregnancy; after 24 weeks, in the realm in which viability becomes possible, only 0.01 percent are performed.[2] There are no data which classify abortions on the basis of viability.[3]

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1 Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 261 (1984).

2 Henshaw, Binkin, Blaine, & Smith, *A Portrait of American Women Who Obtain Abortions*, 17 Fam. Plan. Persp., 90, 91 (1985). Similar statistics are true in Pennsylvania: of 59,258 abortions reported in 1984, only 5 (less than 0.01 per cent) were performed at 27 or more weeks. Pennsylvania Department of Health News Release (June 10, 1985).

3 The data cited, although the most reliable available, do not specify the number of abortions covered by § 3210(b) and similar statutes for two reasons. First, statistics on third-trimester abortions may include fetuses which are not yet viable, no longer viable (as when the fetus has died in utero) or which never were viable (as with anencephalic fetuses). Spitz, Lee, Grimes, Schoenbucher & Lavoie, *Third-Trimester Induced Abortion in Georgia, 1979 and 1980*, 73 Am. J. of Pub. Health 594 (1983). Second, the data may fail to include some terminations of wanted pregnancies, done past the point of viability, which are necessitated by a threat to the woman's health. Although § 3203 of the Pennsylvania statute defines abortion as any termination performed when there is "a reasonable likelihood" (a phrase which is undefined) that the procedure will cause fetal death, this definition conflicts with standard medical definitions of the term abortion. If a fetus is in distress, there may be a reasonable likelihood of fetal death resulting from a cesarean at thirty weeks. But because most physicians would not consider this procedure to be an abortion unless there was also the intent to cause fetal death, it probably would not be included in abortion statistics. *See* J.A. Pritchard, P.C. MacDonald, & N.F. Gant, *Williams Obstetrics* 467 (17th ed. 1985).

Although few in number, post-viability abortions required for life or health typically occur in situations of acute, particularized need. The onset or worsening of such diseases as pre-eclampsia, diabetes, cardiovascular disease, cervical cancer, ovarian cancer, breast cancer, high blood pressure, kidney disease and certain respiratory, urinary and neuromuscular disorders late in pregnancy may present a health risk sufficient to require termination.[4] Conditions of fetal abnormality also account for some late abortions, in part because it is not usually possible to obtain results from amniocentesis tests until after the 20th week of pregnancy.[5] Psychological distress may also reach a level where treatment, which may include abortion, is indicated.[6]

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4 See generally, S.L. Romney, N.J. Hay, A.B. Little, J.A. Merill, E.J. Quilligan, & R.W. Standler, *Gynecology & Obstetrics*, (2nd ed.1981) at 703, 705-708, 710, 712-714, 718, 722, 724, 726, 729, 732, 739, 756, 762, 764, 776, 778, 783-4, 793, 795. *See also Williams Obstetrics* at 477. One of the leading causes of maternal mortality nationwide, hypertensive states of pregnancy (toxemia) does not appear until the late second trimester. Termination of the pregnancy is recommended for severe cases and these are usually post-viability. *Id.* at 528, 543.

5 Alan Guttmacher Institute, 3 *Public Policy Issue In Brief* 1, 4 (1983), Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Fam. Plan. Persp. 26, 27 (1984).

6 *See, e.g., McRae v. Califano*, 491 F. Supp. 630, 675-6 (E.D.N.Y. 1980) *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980).

Such conditions as these were precisely the considerations on which this Court based its decision articulating the centrality of the abortion choice to a woman's overall life and health. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

B. Preferring Fetal Life To The Life And Health Of The Woman Violates The Core Principles Of The Privacy Right Recognized In *Roe v. Wade*.

The primary issue before this Court with regard to § 3210(b) centers on interpretation of the phrase "significantly greater." Appellants contend that the word "significantly" is essentially meaningless, that it designates no measure of risk beyond what is conveyed by the word "greater." That argument, however, fails to satisfy the elementary canon of construction that each word in a statute is presumed to have a core of meaning. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). In this context, "significantly" must be construed to have its plain meaning, which is fatal to the statute's constitutionality.

Section 3210(b) impermissibly subordinates the woman's life or health to the attempt, however futile, to deliver a fetus which will manifest signs of life, however briefly.[7] No limit germane to the woman's well-being exists on this obligation unless the physician can certify that a given method "would present a significantly greater medical risk to the life or health of the pregnant woman."

The Court of Appeals correctly invalidated § 3210(b) on the ground that state actions creating any greater risk to the woman's life or health violate her right of privacy. *Roe v. Wade*, 410 U.S. at 152-153. In the post-viability phase of

7 Live births do not mean that viable infants are being born. A live birth is defined for official statistical purposes in 45 states as a "product of conception, irrespective of the duration of the pregnancy which . . . breathes or shows any other evidence of life such as beating of the heart . . . or definite movement of voluntary muscle." National Office of Vital Statistics DHEW. *International Recommendations in Definitions of Live Birth and Fetal Death*, Washington, D.C. (1950), cited in Grimes at 263. Most live births are of fetuses which do not have the capacity for more than momentary survival. *Id.* at 263, 264.

pregnancy, when the state has a compelling interest in both the woman's health and the potential life of the fetus, this Court repeatedly has made clear that any conflict between those two interests must be resolved in favor of the woman's health. In *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), four Justices so stated explicitly. *Id.* at 501-502. Two additional Justices relied on an exemption for any situation posing as much as "an increased risk" to the woman's life or health in order to uphold a second physician requirement for post-viability abortions. 462 U.S. at 485 n.8. No theme has been more central to this Court's elucidation of the abortion right than the primacy accorded the maintenance of the woman's life and health. *Roe*, 410 U.S. at 163-4.

The scope of what constitutes health is broadly defined to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). This principle, too, commands wide support *Roe v. Wade*, 410 U.S. at 207-8 (Burger, C.J., concurring *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 467 (1983) (O'Connor, White and Rehnquist, J.J., dissenting). Health considerations are particularly critical in the third trimester, "when [many] abortions will be emergency operations," *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. at 485, and virtually all are done in circumstances of extreme distress. The exclusion in § 3210(b) of adverse psychological sequelae of live birth from the physician's evaluation of the woman's health needs illustrates the impermissible intent to subvert the woman's life or health which informs the phrase "significantly greater."

The principles of *Roe v. Wade* instruct that every woman needing an abortion has a right to have it performed under "circumstances that insure [her] maximum safety." 410 U.S. at 150. Section 3210(b) deprives women of the maximum safety to which they are entitled by reversing the order of priorities to require use of the method least disadvantageous to the fetus instead of the method least dangerous to the woman. It will force women to incur risk of harms which they otherwise

would not incur because their health is at the bottom of a statutorily-mandated list of priorities. In practice, § 3210(b) will engage the state in further endangering women who already are in life- or health-threatening situations.

Because only abortions which are needed for life or health reasons are at issue in § 3210(b), affirmance of the Court of Appeals' invalidation of that section requires only that this Court reaffirm the principle that preservation of the woman's life or health outweighs any other interest related to abortion.

C. Section 3210(b) Creates Unconstitutionally Vague Standards For Measurement Of Risk And Fetal Care Which Will Chill Doctors From Providing Safe Abortions.

In addition to undercutting woman's health, § 3210(b) also fails to give physicians adequate notice of when selection of a certain abortion method will be deemed criminal.

The term "significantly greater" gives no guidance to the physician as to how much riskier a given abortion technique must be for the woman before he or she can reject that technique in favor of one safer for her but which lessens the chances of fetal viability. The physician must discount a certain amount of risk to the woman if it falls below the level of "significant," but exactly what quantum of risk that is cannot be discerned. The provision is thus unconstitutionally vague. *Colautti*, 439 U.S. at 400.

Appellants defend § 3210(b) by arguing, with no support, that the physician performing a post-viability abortion invariably will be able to quantify the risks associated with the possible methods as either obviously significant in their differences or obviously marginal. Def. B. at 87-88. This argument is premised on an assumed ability to quantify increments of risk which amounts to science fiction.

In fact, there is no way to measure on any objective scale the degree of risk posed by various post-viability techniques needed by women with different serious health problems. Not only is the data concerning relative risks scarce, but each determination is *sui generis*, depending upon a multiplicity of individualized factors. No doctor performing these kinds of

post-viability abortions could be secure in the knowledge that his or her measurement of risk would satisfy the statute.

Section 3210(b) forces the attending physician to consider every method of abortion in order of its likelihood to produce a live birth. The techniques that can be used for abortions after 24 weeks are the intra-amniotic instillation of solutions containing saline, prostaglandin, urea, or some combination of those substances, prostaglandin E_2 suppository, oxytocin or dilatation and evacuation (D&E).[8] There are no data comparing the live birth rates from use of these techniques after 24 weeks.[9] D&E allows no possibility of a living fetus.

Each woman receiving an abortion covered by § 3210(b) presents at the outset some kind of health problem, for which she already may be receiving treatment or medication. This condition or its treatment may create a unique configuration of risks and it may also already have adversely affected the fetus. To the considerations resulting from her particular diagnosis must be added the risks known to be associated with each method. For prostaglandin instillations, for example, contraindications include hypertension, asthma, glaucoma and epi-

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8 Chervenak, Farley, Walters, Hobbins & Mahoney, *When is Termination of Pregnancy During the Third Trimester Morally Justifiable?* 310 N. Eng. J. Med. 501 (1984); Hern, *Serial Multiple Laminaria and Adjunctive Urea in Late Outpatient Dilatation and Evacuation Abortion*, 63 Obstet. & Gynecol. 543 (1984) ("Hern, Serial Multiple Laminaria"); *Williams Obstetrics* at 543. Because of the magnified danger they pose of death and major complication, hysterotomy and hysterectomy are no longer considered acceptable methods for abortion in the absence of additional health reasons for their use, such as cervical cancer. Diggory, *Hysterotomy and Hysterectomy* in Abortion and Sterilization: Medical and Social Aspects (J. Hodgson, ed. 1981) at 331; *Gynecology & Obstetrics* at 1222-3. One complicating factor in assessing the risks of various techniques is that some doctors are beginning to blend the possible techniques. For example, one physician uses laminaria for dilation, injects urea and then removes the fetal material by surgical evacuation. W. Hern, *Abortion Practice* 122-3 (1984).

9 *See* Robins & Surrago, *Alternatives in Midtrimester Abortion Induction*, 56 Obstet. & Gynecol. 716, 720 (1980) for a comparison of "live births" (but not viable births) subsequent to saline and prostaglandin abortions at 24 weeks or less. During the late second trimester, only prostaglandin is reported to result in live birth rates greater than a fraction of a percent.

lepsy.[10] Gastro-intestinal side effects, sometimes severe and prolonged, are common for prostaglandin abortions; almost 50 percent of the patients experience nausea, vomiting, and/or diarrhea.[11] Hypertension is also a contraindication for saline injections, as is sickle cell disease, anemia, heart disease, kidney disease, and blood coagulopathy.[12] The most frequent complications are hemorrage and infection. A disadvantage of both prostaglandin and saline procedures is the length of time patients are incapacitated.[13] Actual labor, which carries its own set of risks, may last four to 12 hours.[14]

The literature contains no contraindications based on the patient's health condition for the use of D&E.[15] In assessing the advisability of using D&E, the primary factor is the

10 Hern, *Abortion Practice* at 125.

11 Kerenyi, *Intraamniotic Techniques* in Abortion and Sterilization at 368. Additionally, chills, fever, coughing, and shortness of breath, as well as more severe respiratory and cardiovascular complications, have been observed in patients receiving prostaglandins. *Id.* After a prostaglandin procedure is completed, a dilatation and curettage may be "routinely" required "since emptying of the uterus is so frequently incomplete." K.R. Niswander, *Manual of Obstetrics* (1980) at 22.

12 Kerenyi, *Hypertoxic Saline Instillation* in G.S. Berger, et al., Second Trimester Abortions: Perspectives After a Decade's Experience 179 (1981); Niswander, at 22. Hypernatremia (excessive increase in serum/sodium levels) occurs less often, but with results ranging from headaches and dizziness to seizures and coma. Kerenyi, *Intraamniotic Techniques* at 363.

13 The overall injection to abortion interval is approximately 24 hours for saline (somewhat shorter if combined with oxytocin), and 16 hours for prostaglandin. Binkin, Schulz, Grimes & Cates, *Urea-Prostaglandin Versus Hypertonic Saline For Instillation Abortion*, 146 Am. J. Obstet. Gynecol. 947, 949 (1983).

14 Rooks & Cates, *Emotional Impact of D&E vs. Instillation*, 9 Fam. Plan. Persp. 276 (1977).

15 As a surgical procedure, however, it always carries the risk of cervical laceration and even perforation. Other complications include excessive blood loss, hemorrhage and pelvic infection. Peterson, et al., *Second Trimester Abortion by Dilatation and Evacuation: An Analysis of 11,747 Cases*, 62 Obset. & Gynecol. 185 (1983).

individual physician's level of skill and training.[16] During the second trimester of pregnancy, D&E is now recognized as the safest method of abortion. *City of Akron*, 462 U.S. at 436. Although it was once thought to be safe only early in the second trimester, now physicians skilled in the technique can successfully use it as the method of choice for both late second-trimester and third-trimester abortions.[17]

Conscientious physicians who must comply with § 3210(b) will face impossible questions in trying to select a method which will both insulate them from prosecution and protect the health of their patients. For a physician who is skilled in D&E, for example, that procedure might very well be considered the safest, most comfortable, and least traumatic one for the patient. But any such doctor would be in a quandary as to how much less the risk to the woman must be before the D&E would not be criminal. What if a hypertensive patient has contraindications for both kinds of instillation? Are recognized contraindications enough, or must the risk of mortality reach a certain threshold? If so, what is that threshold? How severe must the hypertension or asthma or epilepsy be before the physician rules out the use of prostaglandin? What level of anemia or kidney disease constitutes a "significantly greater" risk for saline? Does the statute intend to compel the forcing of human beings to spend up to 12 hours in labor and more hours vomiting and with diarrhea? To these questions must be added the considerations unique to each patient's case.

The physician's dilemma is compounded by the fact that, because so few abortions after 24 weeks are performed, comparative morbidity data which segregate that time period are virtually non-existent. So he or she is left with no reference point to assist in the assessment of risk and no defense if a

16 Cates & Grimes, *Morbidity and Mortality of Abortion in the United States* in Abortion and Sterilization at 156-58.

17 Hern, *Serial Multiple Laminaria.* Letter from Dr. Warren Hern to Janet Benshoof (June 28, 1985) (see Appendix A to this brief at 1a-4a), provides examples of three safe late D&E procedures, combined with laminaria. One was performed at 30 weeks, the other two at 27 weeks.

local prosecutor later wants to second-quess whether a given risk was "significantly greater."

In addition to the method choice provision, Section 3210(b) also requires the physician performing a post-viability abortion to use the same overall standard of care toward the fetus that would be used if the fetus were intended to be born rather than aborted. This clause contains no exception for the woman's life or health, and thus is even more clouded in its ramifications for when treatment choices to insure the woman's well-being might result in criminal prosecution.[18] Furthermore, the standard of care provision is ambiguous on whether it imposes a subjective or objective standard for determining liability.

As the Third Circuit realized, these problems become all the more serious in the intrusions they generate on the exercise of a fundamental right because they often will occur at the borderline of viability. *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 299-300 (3rd Cir. 1984). The uncertainty of determining viability, coupled with a margin of error of about 11 days,[19] will force physicians to hedge their bets in ways detrimental to women's health even for abortions before viability.[20]

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18 For example, any fetus manifesting signs of life or movement after a post-viability procedure will be extremely premature. Premature infants often suffer from Repiratory Distress Syndrome (RDS). *See Williams Obstetrics* at 769; Schmidt, Sims, Strassner, Paul, Mueller, McCart, *Effect of Antepartum Glucocorticoid Administration Upon Neonatal Respiratory Distress Syndrome and Prenatal Infection*, 148 Am. J. Obstet. & Gynecol. 178 (1984). Steroids are administered to the pregnant woman who threatens to deliver prematurely because steriods enhance fetal lung capacity and increase the chances of viability. *See Williams Obstetrics* at 755; Schmidt et al., at 178. Steroids, however, are contraindicated for pregnant women with hypertension or diabetes. 29 *Physician's Desk Reference*, 1764 (1984). Because the degree of care provision requires the doctor to do whatever is necessary to ensure fetal viability, he or she would be unsure under this section whether it was required to administer the steroids, a treatment for the fetus that could endanger the woman.

19 *See Colautti*, 439 U.S. at 395 and Grimes at 264.

20 The reach of this health-subverting provision does not end there. As Pennsylvania defines abortions, its scope will include any premature pregnancy termination which carries "a reasonable likelihood" of causing fetal death. See *supra*, n. 3. This will include any premature delivery procedure when the fetus is seriously at risk. The impact of § 3210(b) in these situations will be to distort appropriate medical judgments to compel use of the "best" method for the fetus (even if *all* the methods under consideration provide a chance of fetal survival) by forcing the woman to assume some greater degree of health or life endangerment.

D. Section 3210(b) Will Deprive Women Needing Abortions of The Medical Advice and Care On Which They Can Rely To Protect Their Health.

In making the decision whether to have an abortion, a woman is entitled to receive the best medical advice which her physician can provide. For that reason, the physician must be accorded " 'the room he needs to make his best medical judgment.' " *City of Akron*, 416 U.S. at 427 quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973). "The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion." *City of Akron*, 416 U.S. at 427 (citations omitted).

In no situation is the woman's need for medical advice based solely on her own health interests more compelling than prior to an abortion necessary to preserve her life or health. The later the pregnancy and the more dangerous the abortion, the stronger her privacy-grounded right to the protection of her own life and health.

Section 3210(b) violates the abortion right for these women by forcing the woman's doctor to render medical care and advice which weighs her health against the fetus' in the shadow of a threatened criminal prosecution. In many situations, it will preclude consideration of methods which are safest for the woman, and it inescapably skews the medical judgment upon which women are entitled to rely.[21] Furthermore, women may

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21 Indeed, the rationale for allowing the state to require a second physician to attend a post-viability abortion is that the woman's doctor will be acting to carry out her best interests, which might be contrary to those of the fetus. *Ashcroft*, 462 U.S. at 476. Section 3210(b) turns this principle on its head, by depriving women of access to a physician upon whom they can rely for advice and care solely in their interests.

not even be aware that the medical advice they receive is based on any consideration other than the protection of their life and health.

E. A Woman's Right To Obtain An Abortion Needed For Her Life Or Health Includes A Right To Decide Which Risks She Is Prepared To Accept.

The right to choose an abortion includes the right to effectuate that decision. *Akron*, 462 U.S. at 430. Although the state may entirely prohibit purely elective abortions after viability, those women who need abortions for life or health reasons at that stage of pregnancy retain the right to terminate their pregnancies. *Roe*, 410 U.S. at 163-4. The State's attempt, through § 3210(b), to deprive women of the choice of the method to be used, would eviscerate the decisional right itself.

A woman affected by § 3210(b) is one whose life or health necessitates an abortion performed late in the pregnancy when it is most dangerous. For her, more than for most abortion patients,

> "[t]he decision to have an abortion has 'implications far broader than those associated with most other kinds of medical treatment' and thus . . . it [should be] made 'in light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient.' " *City of Akron*, 462 U.S. at 443 (citation omitted).[22]

22 This Court has also ruled that abortion must be treated by the states in a manner consistent with the regulation of other medical procedures. States may not adopt "abortion regulations that depart from accepted medical practice." *Akron*, 462 U.S. at 431. As with other surgical procedures, the final weighing and assuming of risks of an abortion necessary for life or health must be left to the patient. After she has been fully advised of the range and nature of the possible complications associated with the various methods, the patient "is the one to decide which of the possible consequences [s]he wants to risk." *Dunham v. Wright*, 423 F. 2d 940, 945 (3d Cir. 1970) (applying Pennsylvania law). "The weighing of these risks against the individual subjective fears and hopes of the patient is not an expert skill. Such evaluation and decision is a nonmedical judgment reserved to the patient alone." *Cobbs v. Grant*, 502 P.2d 1, 10 (Cal. 1972).

She, especially, is entitled to weigh and resolve the ramifications of selecting one method rather than another—the likelihood one might entail of undergoing prolonged labor versus the possibility inherent in another of serious perforation, or the risk of bringing to birth and short, painful life a seriously impaired infant.[23]

The possibility that the fetus will emerge manifesting signs of life for moments before its death creates a serious, not trivial, threat to the emotional well-being of a woman whose own life or health requires the abortion.[24] A woman carrying a fetus which has an abnormality prohibitive of normal life expectancy could nonetheless be forced under § 3210(b) to undergo labor and delivery in order to maximize the chances for the fetus to be aborted alive. A woman who lawfully has decided, perhaps with great anguish, not to bring into being a fatally impaired child cannot be compelled to witness the death of that child by any principle of law consistent with due process.

Considerations of this magnitude will determine not just the preference for a particular method but the underlying decision itself. Section 3210(b) would prohibit the woman from exercising her own best judgment, in the context of a medical procedure needed for her life or health, about which conse-

23 A child born with Tay-Sachs disease, for example, with a life expectancy of four years, was found to suffer from

> mental retardation, susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with her eyes, inability to take an interest in her surroundings, loss of motor reactions, inability to sit up or hold her head up, loss of weight, muscle atrophy, blindness, pseudobulper palsy, inability to feed orally, decerebrate rigidity and gross physical deformity. *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 816, 165 Cal. Rptr. 477, 480-481 (1980).

24 In a clinical study to compare D&E with prostaglandin instillation for second trimester abortions, three of the women who had been randomly assigned to the prostaglandin group dropped out of the study because of their fear of a long, painful labor culminated by abortion in bed. Grimes, Hulka, & McCutchen, *Midtrimester Abortion by Dilatation and Evacuation Versus Intra-Amniotic Instillation of Prostaglandin $F_{2\alpha}$: A Randomized Clinical Trial*, 137 Am. J. Obstet. Gynecol. 785, 789 (1980).

quences she could best endure. Such a barrier is forbidden by the principles reaffirmed in *City of Akron*, which held that even the state's compelling interest in the woman's health "will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth." 462 U.S. at 444.

II. THE REQUIREMENTS OF SECTIONS 3205 AND 3208 ARE DESIGNED TO CONVINCE WOMEN NOT TO HAVE ABOFTIONS, TO INTERFERE WITH THE INFORMED CONSENT PROCESS, AND TO FORCE DOCTORS TO PRESENT INFORMATION THAT MAY BE INAPPROPRIATE, HARMFUL OR BIASED.

Sections 3205 and 3208 purport to ensure an "informed consent" for the abortion decision. In reality, this section subverts the general purposes of informed consent and serves to conceal choices which have been taken out of the woman's hands by other sections of the statute.

A. Section 3205(a)(1)(iii) Encourages Doctors To Ignore The Informed Consent Process For Women Needing Post-Viability Abortions.

Section 3210(b) requires that the doctor performing a post-viability abortion weigh the risks to the mother and the risks to the fetus, and then unilaterally decide which abortion technique to use. Section 3205(a)(1)(iii) requires a doctor only to tell a woman "the particular medical risks associated with *the particular abortion procedure to be employed*." (emphasis added) This informed consent section, therefore, permits doctors to conceal the entire weighing process they have undertaken as mandated by § 3210(b). Women in need of life or health-saving post-viability abortions are never informed of the availability or risks of alternative abortion procedures. The woman may never be told that the fetus has been balanced against her health in the choice of the particular technique or that other doctors may weigh risks differently.[25] She may never

25 Although a doctor arguably could add information to explain this, the protection against civil liability if § 3205 is followed [see § 3205(d)] would discourage doctors from deviating from this section.

be given the information which would give her the opportunity to decide if this is the best doctor or choice for her.[26]

B. The Informed Consent Requirements Of The Statute Depend Upon The Interplay Of Sections 3205 And 3208.

The state attempts to disguise the full impact of the informed consent requirements by separating sections 3205 and 3208. (Def.B., p. 65.) Yet the statute plainly states that there is no informed consent unless the physician or an agent not only informs the patient of the availability of the material described in § 3208, but also informs her that the materials describe the unborn child and offer alternatives, and also answers questions about the material itself. § 3205(a)(iii).

It is understandable that the State has chosen to downplay the relationship of the § 3208 material to § 3205 in light of its admission that merely offering this § 3208 information to women could be detrimental to their health. (Stipulation 109, J.A. p. 45a.)

The state further claims that the § 3208 material is not objectionable because its presentation is optional. This ignores the fact that many women will believe that the doctor encourages and endorses the material, thereby making it not truly "optional".[27] Women who are likely to be "traumatized" by

26 In contrast, the Pennsylvania Legislature has comprehensively defined informed consent as it applies to all procedures *except* abortion. The "Hutchinson Amendment" to the Health Care Services Malpractice Act, 40 Pa. Stat. Ann. § 1301.101 et seq. (Purdon 1982-83 Supp.) was enacted specifically to ensure "the patient's right to know the type of treatment that he is to receive, the risks, the alternatives that are available to him with respect to treatment as opposed to the problems that the medical profession faces in connection with the therapeutic process." Comments of Rep. Hutchinson, 66 Pa. Legis. J. House, 2318-2319 (July 21, 1975). Thus the law requires that all patients are informed of "those risks, possible consequences, and alternatives to treatment that a reasonable patient would consider material to his decision whether or not to undergo treatment." 40 Pa. Stat. Ann. § 1301.103

27 It is unrealistic to assume that a woman in such a stressful situation will readily distinguish between information she has a "right to review," information the doctor "orally" describes to her upon her request or upon

such disclosure will suffer harmful effects whether the materials presented are mandatory or not. (Stipulation 98, 109, J.A. pp. 41a, 45a) Only the doctor or trained counselors, in conjunction with the woman, can know exactly which information will contribute to a particular woman's informed consent.

C. The Statute's Rote Recitation Requirements Undermine True Informed Consent for Many Women.

The informed consent provisions of the Abortion Control Act, §§ 3205 and 3208, are not merely a departure from the Pennsylvania informed consent law which governs all other medical practices.[28] Sections 3205 and 3208, include several statements designed to convey to the woman that abortion is not the best decision.[29] The state suggests that any detrimental

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the doctor's own judgment, and information which the state requires. The § 3208 material is the only material singled out for special mention, and the patient will not know if it is "optional" because the state made it so or because the doctor is holding back necessary information.

28 *Compare* Sections 3205 and 3208, requiring that the doctor or his agent recite eight categories of information to each and every abortion patient with the Pennsylvania "Health Care Services Malpractice Act," 40 Pa. Stat. Ann. § 1301.101 et seq., which gives physicians great leeway to provide the patient with information that "a reasonable patient would consider material to the decision," and allows the doctor to omit any information that "would have resulted in a seriously adverse effect on the patient or on the therapeutic process . . ." 40 Pa. Stat. Ann. § 1301.103

29 For exampl[illegible] 3205(a)(1)(iii) requires that the woman be informed "that there may be [illegible]imental physical and psychological effects which are not accurately forse[illegible]" § 3205(a)(2)(ii) requires that the woman be informed "that the fath[illegible]ble to assist in the support of her child, even in instances where the fath[illegible]offered to pay for the abortion;" and § 3205(a)(2)(iii) requires that [illegible]an be informed that she has "the right to review the printed materia[illegible]described in § 3208." Section 3208(a)(2) requires that printed materials d[illegible]ibe "the probable anatomical and physiological characteristics of the unbo[illegible] child at two week gestational increments from fertilization to full term". In addition, § 3208(a)(1) includes a statement that "[t]he Commonwealth of Pennsylvania strongly urges you to contact [childbirth and adoption agencies] before making a final decision about abortion."

affects can be mitigated suggesting physicians or counselors "*should* give *additional information* which tailors the explanation to each woman's personal circumstances." (Def.B., pp. 69-70, n. 24) (emphasis added)

A patient's confidence and trust in her doctor or counselor, is an underlying component of informed consent. It is difficult to conceive this trust being built when the woman must differentiate between the doctor's advice to her, state-required pronouncements, and "additional information" intended to supplement or disclaim the government information.

Doctors are required to orally inform the woman that she has the right to review materials which describe the "unborn child." The State does not attempt to suggest what "additional information" (Def.B., pp. 69-70, n.24) could mitigate the effects of this on women who are choosing abortion because the fetus is severely deformed or because their life is in danger. The state blithely assumes that graphic descriptions of "the unborn child" through all stages of pregnancy are relevant to all women, regardless of their individual circumstances. The state also assumes that for a pregnant woman, informed consent involves only a choice between full-term childbirth or immediate abortion. (Def.Br., pp. 70-71.) This is not always true. For some women needing medical treatment of diseases such as cancer, abortion is one of several options in an informed consent discussion. If for example, a woman who is 24 weeks pregnant presents with metastatic breast cancer, she will require chemotherapy to arrest the cancer. Such chemotherapy endangers the fetus. The options, therefore, include: (1) delaying maternal treatment until full term delivery—an unacceptable maternal risk for most women; (2) performing immediate abortion and providing immediate treatment to the woman; or (3) (an in-b[illegible]ween choice) delaying 4-6 weeks and delivering the fetus by cesarean section after maternal treatment with steroids, in an effort to improve fetal survival. The pregnant woman and her family, depending upon their desire for an infant and willingness to accept the various risks, should

be informed of these options and be permitted to decide on the treatment to be given.[30]

There are other ways in which this statute precludes doctors from exercising their best medical judgment. Section 3205(a)(iii) requires doctors to warn all women of "unforeseeable" medical risks of abortion, despite the fact that abortion, particularly early abortion, has been the most studied medical procedure in the United States. After 15 million abortions, some risks may be remote but none are "unforseeable."[31]

Even if a woman has already made her decision to abort, either on her own, in consultation with her personal doctor, family, clergy, or friends, the doctor is required to make available information which *urges* her to further delay her abortion decision until she has contacted childbirth and adoption agencies. Patients will be confused and possibly harmed by a message from the state which urges them to delay the

30 Stubblefield, "Some Medical Considerations," in Rhoden, Stubblefield, Benshoof & Callahan, *Late Abortion and Technological Advances in Fetal Viability*, 17 Fam. Plan. Persp. 160, 162 (1984). Similar options apply in the choice of treatment for cervical carcinoma. See, Lee, Neglia & Park, *Cervical Carcinoma in Pregnancy*, 58 Obstet. & Gynecol. 584, 586-587 (1981). The effects of certain drugs on the fetus constitute a major consideration in pregnancy-associated therapeutics. Barber, *Fetal and Neonatal Effects of Cytotoxic Agents*, 58 Obstet. & Gynecol. 415, 425 (1981).

31 Consent does not become "informed" as a result of outdated or inaccurate information. While once it may have been desirable and accurate for Pennsylvania to require a warning about "unforseeable risks" due to abortion, *Planned Parenthood Association v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub. nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976), this is no longer the case. "A clandestine procedure before '970, abortion has been thrust into the medical arena—where procedures can be performed more safely, techniques improved, and costs reduced. We now know more about induced abortion than any other surgical procedure." Cates, *Legal Abortions and Women's Health Gains and Losses in the 1970's* reprinted as *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982). How can a doctor answer a woman's questions about what these supposed risks are if he or she doesn't know of any that are "unforseeable"?

abortion when any competent doctor will give the opposite advice.[32]

The nonmedical pronouncements required by § 3205 (a)(2)(i-ii) are likely to raise questions for the woman which medical personnel are ill suited to answer and which may give some women false expectations.[33]

D. The Prepared Speech Requirements Of Sections 3205 And 3208 Are Unconstitutional Under The Standard Set Forth In *Akron*.

The Third Circuit was correct in holding the informed consent requirements imposed by 3205 and 3208 to be squarely governed by this Court's decision in *Akron*, 462 U.S. 416 (1983).

Akron reaffirmed that physicians must be given room to make medical judgments, not only in the provision of abortion services but also in "assisting the woman in the decisionmaking process." 462 U.S. at 427. Although certain state regulations may be enacted that impose on the first trimester of pregnancy; such as the reporting and informed consent requirements upheld in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); such regulations are constitutional in the first trimester only if there is no significant impact on the woman's exercise of the abortion right and such regulations are justified by "important state health objectives." *Akron*, 462 U.S. at 430. The blanket imposition of §§ 3205 and 3208 violates both these standards. The information is designed to skew a choice to childbirth, and to interfere with the physi-

32 Delaying abortion adds directly to the risks of complication and death. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterility at 158; Centers for Disease Control, Dept. of Health and Human Services, *Abortion Surveillance 1979-1980 (1983)* at 10.

33 National statistics show that as of 1982, 41% of women living with a child under 21 years of age whose father was not in the household were not awarded child support, and that less than 50% of the women awarded child support received the full amount. *U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Special Studies*, Series P-23, No. 124 (1982).

cian's best medical judgment; both factors having a significant impact on the woman. There is no health justification for these requirements and the state has admitted they may be detrimental to health. These sections, therefore, constitute an unconstitutional interference with a woman's privacy right. *Akron* 462 U.S. at 427-431.

E. The Statute Requires The Physician To Be The Agent For The State's Campaign To Influence A Woman Against Abortion In Violation Of The First Amendment.

In the definition section of the statute, 3203, the legislature defines "unborn child" as "a human being from fertilization until birth . . . ." The expressed legislative policy of trying to stop abortion is implemented by forcing doctors to make pronouncements designed to cast doubt on an abortion decision and to encourage childbirth.[34] The physician is compelled to make certain pronouncements for the state with which he or she might profoundly disagree. As this Court has observed, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). *See also, West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

The dictated counseling requirements would replace the neutral information now provided, and place "pro-childbirth" speech in a preferred position. Content-based regulation of speech requires the strictest scrutiny. *See Carey v. Brown*, 447 U.S. 455, 461-62 (1980). The impermissibility of this particular forced speech is underscored by this Court's admonition that the state cannot adopt one "theory of life" that overrides a woman's privacy right. *Roe v. Wade*, 410 U.S. at 162.[35]

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34 See brief for the United States as *Amicus Curiae* in Support of Appellants at 18.

35 The First Amendment also protects a right to listen and receive information, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976), and it is undisputed that this includes information about abortion. *Bigelow v. Virginia*, 421 U.S. 809, 821-22 (1975). The woman listening to the required litany is in every sense a captive audience. If she does not go through the required counseling, she will be unable to obtain an abortion. Because she has no choice but to listen, her right not to receive information must be especially protected. *See Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949); *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952), (Douglas, J., dissenting).

III THE REPORTING REQUIREMENTS OF SECTION 3214 HAVE A SIGNIFICANT IMPACT ON A WOMAN'S ABORTION DECISION WITHOUT FURTHERING ANY HEALTH INTERESTS.

The Pennsylvania Abortion Control Act contains two sections regarding reporting requirements [§§ 3207(b) and 3214(a)-(i)]. Three subparts § 3214(a), (b) and (h) are before this Court. On June 17, 1985 the district court in this case held a hearing and enjoined §§ 3207(b) and 3214(f) requiring public disclosure of the required reports on facilities because they violated privacy rights. That court made numerous findings of fact which are applicable to the subsections of the reporting section that are before this Court.[36]

A. The New Reporting Requirements Do Not Further Any Maternal Health Interests.

Abortion providers in Pennsylvania have been reporting composite data on abortions to the State Health Department since 1974.[37] In turn, the state has routinely submitted the data to the federal government's Centers for Disease Control for its national abortion surveillance work. The new reporting forms prescribe a separate form and detailed information on each abortion.[38] Moreover, the new reporting statute requires each individual abortion form, as well as separate facility or doctors' reports, to be disclosed to the public.

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36 See Findings of Fact, Discussion, Conclusions of Law, and Order, No. 82-4336 (E.D. Pa. June 17, 1985), (hereafter "Findings of Fact"), a copy of which is appended to plaintiffs' brief.

37 See "Quarterly Report of Abortions Performed," App. B to this brief at 4a-7a.

38 See Def. B., p. 55a and § 3214(a).

The appeliants have never justified the many details required by the reporting section of the Act. Instead, they simply assert that the information required "in many respects" (Def. B. p. 61) corresponds to national abortion data collected by the Centers for Disease Control (CDC). However, Pennsylvania, under its present reporting system, has supplied CDC with all the data necessary for the abortion surveillance reports.[39] Appellants have not given any reason to this Court why public disclosure of each individual report furthers health interests, although they admitted in the district court that the state interest in the public disclosure sections was not to further health but to "facilitate the First Amendment rights of those opposed to abortion." Findings of Fact, Slip Op. at 37.

The inadequacy of any maternal health interests is further evidenced by a comparison to the reporting statutes of the twenty-six other states that have such requirements.[40] No other state requires public disclosure of the reports,[41] while twenty-three states explicitly require confidentiality of the reports.[42]

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39 The specific data reported by CDC for each state includes: 1) residence status (state versus out of state); 2) age; 3) race; 4) marital status; 5) number of live births; 6) type of procedure; 7) weeks of gestation; 8) previous induced abortions; 9) weeks of gestation and procedure; 10) weeks of gestation and age group; 11) weeks of gestation and race; 12) age group and race; 13) marital status by race; and 14) death-to-case rate for legal abortions by type of procedure, and by weeks of gestation. Preface to Centers for Disease Control, U.S. Dept. of Health and Human Services, *Abortion Surveillance: Annual Summary 1979-1980* (1983).

40 *See* List of State Statutes App. C to this brief at 13a.

41 Idaho allows public access to statistical compilations only, based on the reports. Idaho Code § 39-261(b) (Supp. 1984). Missouri only allows the statistical data to be inspected and acquired by local state or national public health officers. Mo. Rev. Stat. § 188.055(2) (Supp. 1982). While these states allow limited access to the statistical data based on the reports, only Pennsylvania permits the general public to have access to the actual report forms.

42 *See* List of State Statutes on confidentiality, App. D to this brief at 14a.

B. The Reporting Requirements Of Section 3214 Expose Women Receiving Abortions To Harassment Because They Permit Disclosure Of Individual Identities.

Individual women visiting abortion providers or women who have sought and received abortions have increasingly become targets of anti-abortion harassment.[43] Public disclosure of a woman's identity is one form of harrassment.[44] The specificity of the report forms required by § 3214(a)(2)-(14) permit identification of some of the women by anyone. The statute requires that the political subdivision in which the woman resides be reported, (§ 3214(a)(2)); as well as her age, race and marital status (§ 3214(a)(6)). In Pennsylvania, political subdivision can include county, town, city, ward, census track, or precinct. Thus, a political subdivision within the meaning of § 3214 could include an area as large as a thirty mile county (Sullivan) or as small as a city ward. That fact, combined with details such as race, age, and marital status could be used to easily identify a woman who had had an abortion and who lived, for example, in a sparsely populated area.[45]

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43 See Findings of Fact and Donovan, *The Holy War*, 17 Fam. Plan. Persp. 5 (1985).

44 In a recently published book, J. M. Scheidler, *Closed: 99 Ways To Stop Abortion* (Ignatius Press, San Francisco, Cal. 1985), the author, who is the director of the Pro-Life Action League, goes so far as to recomend the use of private detectives. The repercussions of being identified can be devastating. One young woman was thrown out of her home and forced to drop out of college after an anonymous caller told her parents that she had been to the Women's Health Center in Duluth, Minnesota, a facility which performs abortions. See "Letter from Katherine R. Welsh to Janet Benshoof (August 2, 1985), App. E to this brief. A lawsuit was brought by another young woman against an anti-abortion organization and the hospital where she obtained an abortion after anti-abortion activists informed her parents by telephone and mail about her recent abortion. The woman's close relationship with her mother was ruined because of these communications. Japanga, "Abortion Suit Brought on by Privacy Issue", *The Los Angeles Times*, April 10, 1984 at p. 2.

45 In 1980, there were only six black women of childbearing age living in Sullivan County. General Population Characteristics, 1980 Bureau of Census, Pennsylvania, p. 66. Of these women, one was 17 years old, two were 18, one was nineteen, two were twenty. Thus, the one nineteen-year-old

For women who have had late abortions because of medical problems or fetal anomalies the loss of anonymity is particularly traumatic because of the additional information the forms disclose.[46]

C. The Reporting Requirements Of Section 3214 Permit Identification Of Doctors Which Will Result In Harassment And Chill Doctors.

A facility, as defined in the § 3203, includes a physician's office. The proposed reporting forms require the name and county of the facility where the reported abortion is performed,[47] and section 3214(h)(4), relating to abortion complications, requires the name and address of the facility where the abortion is performed.[48] Any doctor who performs abortions in his or her office can easily be traced through the information supplied on these report forms. This is true despite the fact 3214(e)(2) allows the physician's name to be substituted by an identifying number.

Many doctors, particularly in nonmetropolitan areas, faced with the prospect of public disclosure of reports by which they

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black woman residing in Sullivan County who had an abortion is easily identified by anyone examining the required report form. A woman living in a large city such as Pittsburgh could also be identified. For example, in census tract number 2503 of Pittsburgh, there were only ten white females aged 20-24. Table P-2, General Characteristics of White Persons: 1980 Census of Population In Housing User's Guide, Pittsburgh, PA.

46 Section 3211(a) for example requires that the physician indicate the basis for the medical judgment that abortion is mandated. A woman who undergoes a late trimester abortion because the fetus has severe congenital defects, for example, not only loses her anonymity but has no protection from other intimate details being made available to the general public.

47 Section 3214(a)(1). See also Def. B., p. 55(a) for copies of the proposed forms.

48 See Def. B., pp. 56(a)-57(a). Additionally, Section 3207(b), enjoined by the district court on June 17, 1985, requires additional data on any facility where an abortion is performed. See Findings of Fact.

may be identified as referring for or performing abortion procedure, will stop providing this services to women.[49]

For many women in this country, abortion is not readily accessible.[50] In the last three years, incidents of harassment and intimidation against doctors and clinic staff who provide abortion counselling and procedures have risen in number and intensity.[51] These incidents of harassment have taken place at clinics, hospitals, and at the homes of doctors and clinic staff.[52] The fear of such incidents will have a chilling effect on

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49 See Findings of Fact Nos. 3 and 24. Tracing the identity of a doctor is facilitated by public access to a great deal of information. For example, a physician in Mercer County would have to list the name of his or her office where the abortion was performed, the referring doctor (§ 3214(a)(1)) and/or the name and address of any parent, subsidiary, or affiliated organization, corporations, or associations (§ 3207(b)) (currently under a preliminary injunction, Findings of Fact). Public access to such information negates the "protection" offered by the statute by its requiring a number in lieu of the physician's name. The loss of doctors in nonmetropolitan areas who are identified and harassed to the point of ceasing to provide abortion services will greatly burden accessibility to abortion services for many women who would then have to travel to a city to obtain an abortion. Those that cannot do that will be precluded from access to abortions. Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 Fam. Plan. Persp. 119, 123 (1984).

50 As of 1982, 78 percent of all United States counties have no identified abortion service providers, while 28 percent of all women of reproductive age live in such counties. Henshaw, Forrest & Blaine at 123.

51 For example, between 1977-1980, there were four reported bombings and no bomb threats, 35 invasions, one death threat, and five reported incidents of assaults/batteries. In the period between 1982 and 1985 (as of July 3rd) these activities had steadily increased. There were a total of 27 reported bombings; 111 bomb threats to clinics; 86 invasions; 13 death threats; and 18 reported incidents of assaults/batteries. Between 1977-1980 the total number of specific incidents of clinic violence (as reported to the National Abortion Federation) was 61; between 1981-1985, the total number of such incidents was 411. *Summary of Clinic Violence as Reported to the National Abortion Federation*, a copy of which is being lodged with the Clerk of the Court by *Amicus Curiae* National Abortion Federation. See also Findings of Fact, Nos. 9, 13, 18, 23, 29, 33, 35, 40, 41, 46, 50, 58, 60 and 68 and Stip. J.A. No. 192, pp. 50a-51a.

52 *Id.* Hospitals have proven to be very susceptible to the pressure exerted by anti-abortion activists. Recent *Philadelphia Inquirer* articles have

the number of doctors willing to continue to provide abortion services. Prior to the 1982 Pennsylvania Abortion Control Act, the Department separated the abortion records submitted by facilities from the cover sheet which identified the facility.[53] The policy recognized that "certain facilities and physicians could be pressured and possibly harassed by members of the public objecting to the medical abortion practice and that such harassmen could be detrimetal to women's health".[54] Because appellants have stated that the purpose of public disclosure is to aid the First Amendment rights of anti-abortionists,[55] it is clear that identification of doctors and patients is a foreseen outcome of these reporting requirements.[56]

The facts clearly indicate that violations of the anonymity of women and doctors, as well as subsequent harassment is a

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reported that two hospitals, Delaware County Memorial and Metropoiitan Hospital, Springfield Division, have decided to stop performing abortions. One article noted that Delaware County Hospital took such action after anti-abortionists picketed "with signs of names of hospital doctors printed beside the words 'Baby Killers'." Solovitch, "Hospital's abortion ban gratifies protestors", *Philadelphia Inquirer*, May 26, 1985 at pp. 1B, 8B; DiGirolamo, "2nd Hospital to Limit Abortions", *Philadelphia Inquirer*, July 4, 1985 at B9. Hospitals are important abortion providers (48 percent nationally of facilities where abortions are performed.) Henshaw, Forrest & Blaine, 1981-1982 at 123.

53 Findings of Fact, No. 4.

54 *Id.* The policy also noted that "patient care may suffer if physicians or abortion clinics are under harassment." Findings of Fact No. 4.

55 See Findings of Fact, slip op. at 20 and 37. Defendants' Brief in this Court omits any reference whatsoever to the district court hearing on the public disclosure issue, their arguments made therein, as well as that court's findings and order enjoining §§ 3207(b) and 3214(f) despite the fact the district court found: "Defendants devote[d] the lion's share of their initial memorandum [to the trial court on these sections] to arguing that disclosure . . . is justified by the state's compelling interest in facilitating the First Amendment rights of those opposed to abortion." *Id.* at 37.

56 § 3214(e)(4) makes it a misdemeanor of the third degree to disclose this type of reported information. The fact that the Commonwealth sought to take some steps (albeit inadequate ones) to protect doctors' identities by § 3214(e) must also be seen as an acknowledgement by defendants of the dangers inherent in such disclosure.

reality, and will serve to be an effective tactic in deterring doctors from continuing to perform abortions and women from obtaining them.[57]

D. The Reporting Requirements Of Section 3214 Are Unconstitutional.

The reporting requirements significantly burden a pregnant woman's abortion decision by threatening removal of anonymity—an essential component of her right to privacy.[58] *Planned Parenthood v. Danforth*, 428 U.S. at 76. Because they burden the abortion right and are unjustified by any compelling state interest they are unconstitutional.

The reporting statute exceeds the strictures imposed by this Court on recordkeeping requirements. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 81. Reporting requirements must "properly respect a patient's confidentiality and privacy . . ." *Id.* at 80. In other instances where personal data is required to be reported to the state, the legitimacy of such requirements turns on whether there exist sufficient safeguards for the protection of the individual's privacy right.[59] No such

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57 See Findings of Fact Nos. 3 and 24.

58 Thus pseudonyms are permitted in cases where women (adult and minor) have challenged abortion laws, as in *Roe v. Wade*, 410 U.S. 113, 120, fn.4 (1973); *Doe v. Bolton*, 410 U.S. 179, 186 (1973); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); and *H.L. v. Matheson*, 450 U.S. 398 (1981).

59 For example, in *Whalen v. Roe*, 429 U.S. 589 (1977), where a New York statute required reporting to the state of those patients who were prescribed particular drugs this Court noted that such reporting statutes must "evidence a proper concern with, and protection of, the individual's interest in privacy." *Whalen* at 605. See also *Brown v. Socialist Workers '74 Camp. Comm.*, 459 U.S. 87 (1982) regarding campaign disclosure requirements, and their applicability to minor political parties. Those requirements were held to be inapplicable to plaintiffs because a showing was made of reasonable probability of threats, harassment and reprisals based on disclosure. *Brown* at 100. As the facts make clear here, (*supra* at 22-27), public disclosure of the abortion reports will inevitably lead to the identification of individual women and doctors and subject them to acts of harassment and intimidation, as well as possible violence.

safeguards exist under this Statute and it is therefore unconstitutional.

IV. THE SUPREME COURT'S DECISION IN *AKRON* SETTLED THE LAW AS TO THE CONSTITUTIONAL STANDARD GOVERNING STATE STATUTES REGULATING ABORTION.

This Court most recently reaffirmed the constitutional principles established in *Roe v. Wade*, 410 U.S. 113 (1973) in the case of *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), in which the Court held unconstitutional various provisions of the City of Akron's abortion ordinance. The *Akron* Court's clear rearticulation of the analytical framework set forth in *Roe* has provided strong guidance to the courts and a clear message to the state legislatures that laws that substantially burden access to abortion absent a compelling state interest will not withstand judicial scrutiny.

A number of cases involving state anti-abortion laws similar to those at issue in *Akron* and *Ashcroft*, were pending at the time of this Court's decisions in those cases. This Court's decisions provided clear guidance on these statutes and those cases were expeditiously resolved.[60]

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60 In the aftermath of the *Akron* and *Ashcroft* decisions, a significant number of those cases still pending were resolved through consent decrees and stipulations by the parties. *Bagley v. Wilkinson*, No. C-81-603W (D. Utah Dec. 2, 1983) (stipulation); *Christensen v. Wisconsin Medical Examining Board*, 551 F.Supp. 565 (W.D. Wisc. 1982), (August 1983) (joint motion); *Miks v. Olson*, Civ. No. A3-82-78 (D.N.D. Aug. 25, 1983) (stipulation); *Poe v. Dep't of Public Health*, C.A. 78-C-4126 (N.D. Ill. 1983); *Glick v. Bryan*, CV-R-81-150 (BRT) (D. Nev. Aug. 29, 1984) (consent decree). In the remainder of the cases, the courts held a variety of these laws unconstitutional (*Charles v. Carey*, 579 F.Supp. 377, 579 F.Supp. 464 (N.D. Ill. 1983); *Margaret S. v. Treen*, 597 F.Supp. 636 (E.D. La. 1984); *Eubanks v. Collins*, No. C 82-0360 L(A) (W.D. Ky. Sept. 11, 1984); *Munson v. Meierhenry*, No. 80-3043 (C.D.S.D. Sept. 29, 1983); *Women's Community Health Center, Inc. v. Tierney*, Nos. 79-162 P, 79-165-P (D.Me. Sept. 9, 1983)) while upholding requirements that do "not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth." *Akron*, 462 U.S. at 430.

The Court's strong reaffirmance in *Akron* of *Roe* has apparently been a major force in curtailing the enactment of state laws which unconstitutionally infringe on a woman's right to abortion. In 1979, the year following the passage of the Akron Ordinance, the highest number of abortion-related laws since *Roe v. Wade*—41—were enacted. Legislation patterned after the Akron Ordinance was enacted in 10 states that year.[61] Subsequent to 1979, apparently in response to the repeated failure of these statutes to withstand constitutional challenges, the number of laws designed to limit access to abortion began to decline. By 1982, only 15 abortion-related state laws were enacted.[62] In 1984, only one state enacted a comprehensive anti-abortion statute.[63] The Court's refusal to retreat from the principles established in *Roe v. Wade* and consistently applied in its subsequent decisions has clarified the law for courts and legislatures.

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61 Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Fam. Plan. Pers. 63, 66 (1982); 8 *Family Planning/Population Reporter* 77, 92-98 (1979).

62 Bush, *Fertility-Related State Laws Enacted in 1982*, 15 Fam. Plan. Persp. 111 (May/June 1983).

63 The Alan Guttmacher Institute, LEGISLATIVE RECORD, State Legislatures—1984 Bills Enacted (1984).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals from which the appeal is taken. In the alternative, this Court should dismiss the appeal for want of finality, consider the appeal papers as a petition for writ of certiorari and deny that petition.

Respectfully submitted,

NAN D. HUNTER
JANET BENSHOOF
SUZANNE M. LYNN
VERNA C. SANCHEZ
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for *Amici Curiae*

August 27, 1985

APPENDIX A

BOULDER ABORTION CLINIC P.C.
1130 Alpine Avenue
Boulder, Colorado 80302
(303) 447-1361

Warren M. Hern M.D., M.P.H.
Diplomat, American Board of Preventive Medicine
Fellow, American College of Preventive Medicine

28 June 1985

Janet Benshoof
Director
Reproductive Freedom Project
ACLU Foundation
132 West 43rd Street
New York, New York 10036

Dear Ms. Benshoof:

In response to your request for information concerning the use of the dilatation and evacuation (D & E) procedure for abortions past the time of fetal "viability", I can give you three examples in my recent experience.

Before describing these examples, however, I would like to point out that the definition of fetal "viability" is subject to various interpretations and is constantly changing. One definition utilizes a length of gestation counting from the beginning of the last normal menstrual period (LNMP); another way of estimating "viability" is according to birth weight. The classical definition of the first is 26-28 menstrual weeks' gestation. It would be difficult to find anyone, even physicians opposed to abortion, who would contend that a fetus is viable at 24 weeks or earlier, principally because fetal lung development is so inadequate at that stage. It would similarly be difficult to find evidence of fetal viability for individuals with birth weights of

500 grams or less. Above these points, however, there are numerous instances of survival, albeit with severe handicaps. It is questionable whether 500-1000 grams or 26-28 weeks constitutes a lower limit of "viability" because the survival rate is so low, especially outside major neonatal centers.

There being a recognizable percentage of survival of individuals born with weights between 500-1000 grams, however, it is possible to say that abortions by D & E are routinely done at the lower limits of this range. For example, in my paper, "Serial multiple laminaria and adjunctive urea in late outpatient dilatation and evacuation abortion" (Obstet Gynecol 63:543, 1984), I described a series of 1000 patients from 17 through 25 menstrual weeks whose abortions were performed by the D & E method. Twenty of these patients, through preoperative diagnostic error, were at 25 weeks' gestation, with fetal weights ranging up to 906 grams. There were no major complications in this group, and the overall major complication rate for the entire series was 0.3%, demonstrating the safety of the method.

In another paper, "Correlation of fetal age and measurements between 10 and 26 weeks of gestation" (Obstet Gynecol 63:26, 1984), I established recommended values for determining fetal age during that portion of pregnancy. Recommended values for fetal weights for weeks 23-26 were all above 500 grams.

Without searching for extreme examples, therefore, it can be demonstrated that the D & E method can be used for the termination of pregnancies beyond the early stage of viability, at least, with superior safety, aside from the medical indications for abortion in a particular case. The method is fully described in my textbook, *Abortion Practice* (JB Lippincott, 1984).

As for extreme examples, three cases illustrate the utility and safety of the D & E method when abortion is indicated well past the most conservative lower limit of fetal viability.

CASE 1

The patient is a 28 year old woman, a health professional in excellent health, who was found to be carrying a fetus with a lethal defect, thanatophoric dwarfism, at 26 weeks' pregnancy. The pregnancy was desired. The diagnosis was made during a routine ultrasound evaluation. By the time the diagnosis was made and a decision to terminate the pregnancy was made, the patient was past the limit for performance of abortion in her state. She contemplated travel to Japan for abortion. She also contemplated suicide. She was, in fact, severely depressed and suicidal at one point. Thanatophoric dwarfism is a rare condition in which the fetal lungs cannot develop and function normally, principally due to restriction of the thoracic cavity. When the patient was referred to me, she was approximately 30 weeks pregnant. I performed a D & E abortion by the method described in the first paper (63:543, 1984), without serious difficulty. Blood loss was 250cc. Fetal weight was 1247 grams. The patient recovered without incident. The diagnosis of thanatophoric dysplasia was confirmed by histopathologic study of fetal tissues.

CASE 2

The patient is a 24 year old woman, an X-ray technician in excellent health, whose pregnancy was planned and desired. The presence of spina bifida was discovered during a routine ultrasound examination, and a decision was made soon after to terminate the pregnancy. The patient was distraught about the diagnosis but determined with her husband that it would be unwise to carry the pregnancy to term. At the time of her referral, she was approximately 27 weeks from LNMP. Abortion was performed using the D & E method as described in the first paper (63:543, 1984) without difficulty. Blood loss was 25cc. Fetal weight was 1049 grams. A severe neural tube defect was present in the fetus. The patient recovered uneventfully and experienced no complications.

CASE 3

The patient is a 28 year old Native American woman with a history of alcoholism and peritoneal adhesions due to previous complicated abdominal surgery. She was found to be carrying a fetus with severe hydrocephalus at 27 weeks from LNMP. Abortion was performed without difficulty using the D & E method described in the first paper (63:543, 1984). Blood loss was 350cc. Fetal weight was 686 grams. The patient recovered uneventfully and experienced no complications.

While I have not included them here, I have seen numerous other cases of severe fetal deformity in which the method of choice for abortion was the D & E method, but most patients presented themselves for treatment before 24 menstrual weeks' gestation. In one case, a woman was referred from Florida with a a diagnosis of conjoined twins. Aside from the fact that the defect was clearly fatal for the fetus(es), carrying the pregnancy to term would have presented a severe hazard to the woman's life. Any other method of abortion would have resulted in severe risks to her life and, in the case of hysterotomy, a 100% risk of major complication. The abortion was performed by D & E without difficulty and with no complications.

Thank you for inviting be to comment on this issue.

Sincerely,

/s/ WARREN M. HERN, M.D.
Warren M. Hern, M.D., M.P.H.

APPENDIX B

Commonwealth of Pennsylvania
Department of Health

QUARTERLY REPORT OF ABORTIONS PERFORMED

Under Act 209, September 10, 1974 of the General Assembly of the Commonwealth of Pennsylvania, the Abortion Control Act, Chapter 35 P.S. § 6606(e), every facility in the Commonwealth of Pennsylvania in which an abortion is performed is required to file with the Department of Health a report showing the total number of abortions performed within that hospital or facility during that quarter year.

The reporting quarters are:

First — January 1 through March 31
Second — April 1 through June 30
Third — July 1 through September 30
Fourth — October 1 through December 31

A report must be filed, even though no abortions were performed.

Please note the *five* tables included in this report have been revised to give more complete information and to comply with the requirements of the Abortion Control Act. All tables must be completed.

For your convenience, two copies of this form are being sent to you. The original, when completed, is to be returned to the Department of Health, the second is for the facility's records.

Reports are due in the Department within 30 days of the end of the quarter.

Send to:

State Health Data Center
Division of Health Statistics and Research
Pennsylvania Department of Health
Room 126, Health and Welfare Building
P.O. Box 90
Harrisburg, Pennsylvania 17108

QUARTERLY REPORT OF ABORTIONS PERFORMED

Facility Reporting

_____

_____

Quarterly Report for the 1st, 2nd, 3rd or 4th Quarter (circle one).

Person to contact for any questions regarding data _____

_____

TABLE 1

INDUCED ABORTIONS BY TIME

Time Period			Number Of Abortions
Weeks of Gestation	OR	Weeks Elapsed From 1st Day of Last Menstrual Period	
0 - 8		0 - 10	
9 - 10		11 - 12	
11 - 12		13 - 14	
13 - 15		15 - 17	
16 - 20		18 - 22	
21 - 24		23 - 26	
25 +		27 +	
Unknown			
		TOTAL	

TABLE 2
INDUCED ABORTIONS BY TYPE OF PROCEDURE

Abortion Procedure	Number Of Abortions
Suction Curettage	
Sharp D & C	
Intra-uterine Saline Instillation	
Intra-uterine Prostaglandin Instillation	
Hysterotomy	
Hysterectomy	
Other	
Unknown	
TOTAL	

TABLE 3
INDUCED ABORTIONS BY AGE OF WOMEN

Age	Number Of Abortions
10 or less	
11	
12	
13	
14	
15	
16	
17	
18	
19	
SUB TOTAL	
20 - 24	
25 - 29	
30 - 34	
35 - 39	
40 - 44	
Over 44	
Unknown	
TOTAL	

TABLE 4

NUMBER OF CONDITIONS AND COMPLICATIONS OF INDUCED ABORTIONS

NO CONDITIONS OR COMPLICATIONS	
COMPLICATIONS Hemorrhage	
Infection	
Uterine Perforation	
Cervical Laceration	
Retained Products	
Other	
CONDITIONS DISCOVERED Rubella Disease	
Hydatid Mole	
Endocervical Polyp	
Malignancies	
Other	
TOTAL	

TABLE 5

INDUCED ABORTIONS BY RESIDENCE OF WOMEN
(PENNSYLVANIA COUNTIES, STATES OTHER THAN PENNSYLVANIA, OR OTHER COUNTRIES)

PENNSYLVANIA COUNTIES	NUMBER OF ABORTIONS

APPENDIX C

STATE STATUTES WHICH HAVE REPORTING REQUIREMENTS

Fla. Stat. Ann. § 390.002 (Supp. 1985); Ga. Code Ann. § 16-12-141(d) (1984 & Supp. 1985); Hawaii Rev. Stat. § 338-9 (Supp. 1984); Idaho Code § 39-261 (Supp. 1984); Ill. Ann. Stat. ch. 81-30, § 10 (Supp. Smith-Hurd 1985); Ind. Code Ann. § 35-1-58.5-5 (Burns 1979 & Supp. 1984); La. Rev. Stat. Ann. § 40:1299.35.10 (Supp. West 1985); Me. Rev. Stat. Ann. Title 22, § 1596(2) (1980 & Supp. 1984-1985); Mich. Comp. Laws Ann. § 333.2835 (1980 & Supp. 1985); Minn. Stat. Ann. § 145.413 (West Supp. 1985); Mo. Rev. Stat. § 188.052 (Supp. 1982); Mont. Code Ann. § 50-20-110 (1983); Neb. Rev. Stat. § 28-343 (1979); Nev. Rev. Stat. § 442.260(2) (1979); N.M. Stat. Ann. § 24-14-18 (1978 & Supp. 1984); N.Y. Pub. Health Law § 4160(2) (McKinney 1977 & Supp. 1984-1985); N.C. Gen. Stat. § 14-45.1(c) (1981); N.D. Cent. Code § 14-02.1-07 (1981 & Supp. 1983); Okla. Stat. Ann. tit. 63, § 1-739 (West 1984 & Supp. 1984-1985); Or. Rev. Stat. Tit. 36, Chap. 435 (1983); S.C. Code Ann. § 44-41-60 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 34-23A-19 (1977 & Supp. 1984); Tenn. Code Ann. § 39-4-203 (1982 & Supp. 1984); Utah Code Ann. § 76-7-313 (Supp. 1983); Va. Code § 32.1-264 (1985); and Wyo. Stat. § 35-6-108 (1977 & Supp. 1985). States without reporting statutes voluntarily report to CDC.

APPENDIX D

STATE STATUTES WHICH REQUIRE CONFIDENTIALITY OF REPORTS

Fla. Stat. Ann. § 390.002(3) (Supp. 1985); Ga. Code Ann. § 16-12-141(d) (1984 & Supp. 1985); Idaho Code § 39-261 (Supp. 1984); Ill. Ann. Stat. ch. 81-30, § 10(12) (Supp. Smith-Hurd 1985); La. Rev. Stat. Ann. § 40:1299.35.10 (Supp. West 1985); Me. Rev. Stat. Ann. tit. 22, § 1596(2) (1980 & Supp. 1984-1985); Mich. Comp. Laws Ann. § 333.2835(4) (1980 & Supp. 1985); Minn. Stat. Ann. § 145.413 (West Supp. 1985); Mo. Rev. Stat. § 188.055(2) (Supp. 1982); Mont. Code Ann. § 50-20-110(5) (1983); Neb. Rev. Stat. § 28-343(10) (1979); Nev. Rev. Stat. § 442.260(2) (1979); N.M. Stat. Ann. § 24-14-18 (1978 & Supp. 1984); N.C. Gen. Stat. § 14-45.1(c) (1981); N.D. Cent. Code § 14-02.1-07(1)(b) (1981 & Supp. 1983); Okla. Stat. Ann. tit. 63, § 1-738(c) (West 1984 & Supp. 1984-1985); Or. Rev. Stat. Tit. 36, Chap. 435 (1983); S.C. Code Ann. § 44-41-60 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 34-23A-19 (1977 & Supp. 1984); Tenn. Code Ann. § 39-4-203 (1982 & Supp. 1984); Utah Code Ann. § 76-7-313 (Supp. 1983); and Va. Code § 32.1-264(b) (1985).

APPENDIX E

WOMEN'S HEALTH CENTER
610 Medical Arts Building, 324 West Superior Street
Deluth, Minnesota 55802 (218) 727-3352

A non-profit clinic for birth control and reproductive choice

August 2, 1985

Janet Benshoof
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Dear Janet:

The Women's Health Center of Duluth is one of the many medical facilities providing abortion services throughout the country were staff and patients have come under increasing harassment from anti-abortion activists. Not only have I received disturbing phone calls at my home from these activists, but several incidents in which anti-abortion activists have identified our patients and contacted their homes have been brought to my attention.

One of the most disturbing of these incidents involved a situation in which an anti-abortion activist called the parents of an eighteen-year-old patient several times and told the parents that she (the young woman) had been to our facility and that our facility performs abortions. It appears that the anti-abortion activist identified the patient by her high school sweater through the school yearbook. Because of this disclosure the young woman was thrown out of her parents home and had to drop out of college.

I recently received an angry phone call from the older sister of a young woman who had just had an abortion performed at our clinic. The woman complained that a letter bearing our

address had been sent to the patient's parents' home pleading that she not have an abortion. The letter was signed by a woman known to me as an anti-abortion activist. I explained that the letter was not sent by anyone from the Women's Health Center and a check of the patient's file showed that her parents address was not in the file. Somehow, the anti-abortion activist had been able to identify the young woman and obtain her address.

The patients gave me permission to sent the attached letters.

Sincerely,

/s/ KATHERINE WELSH
Katherine R. Welsh
Executive Director

No. 84-495

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, et al.,

Appellants,

—v.—

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE CENTER FOR POPULATION OPTIONS, THE AMERICAN JEWISH COMMITTEE, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN FAMILY PLANNING, THE NATIONAL BOARD OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., THE AMERICAN JEWISH CONGRESS, ASSOCIATION OF PLANNED PARENTHOOD PROFESSIONALS, INC., PHYSICIANS FOR CHOICE, THE AMERICAN PUBLIC HEALTH ASSOCIATION, AND INDIVIDUAL PROFESSORS, PHYSICIANS AND MEDICAL SCHOOL DEANS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI*

Planned Parenthood Federation of America, Inc. (PPFA) is a not-for-profit corporation organized in 1922. PPFA is the leading national voluntary public health organization in the field of family planning with 186 affiliates in 44 states and the District of Columbia operating approximately 761 family planning clinics. Forty-four affiliates provide abortion services and most of the affiliates which do not perform abortions offer pregnancy counseling and referral.

The American Public Health Association (APHA) is a national nongovernmental organization. With a membership of over 50,000, it is the largest public health organization in the world. At its national conventions, APHA has repeatedly stated its support for legalized abortion.

The Center for Population Options (CPO) is a national organization concerned with the prevention of unintended adolescent pregnancy. CPO believes that the adolescent's option as to whether or not to have an abortion must be maintained.

The American Jewish Committee (AJC), a national organization dedicated to the protection of civil and religious rights, supports access to abortion as part of its traditional concern for individual liberty, privacy, and free choice.

National Association of Nurse Practitioners in Family Planning (NANPFP) is a national non-profit membership organization of professional nurse practitioners. The aim of the organization is to assure accessible quality family planning services which guarantee reproductive freedom to all.

The National Board of the Young Women's Christian Association of the U.S.A. (YWCA) represents over two million

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* All parties have given their consent to the filing of this brief in letters filed with the Clerk of this Court.

women and girls. The YWCA, a non-profit organization, has had a policy since 1967 of supporting a woman's right to choose whether or not to have an abortion, uncoerced by government.

The American Jewish Congress is a national organization of American Jews. It neither favors nor opposes abortion but believes that a woman's decision whether to undergo abortion must be her own, uncoerced by government.

Association of Planned Parenthood Professionals, Inc. (APPP) is a New York not-for-profit corporation whose members are physicians and health professionals associated with family planning.

Physicians for Choice, a project of PPFA, is a nationwide, bipartisan organization of 4,000 physicians which supports family planning issues and believes in preserving the right of women to decide when or whether to bear a child.

Individual Professors, Physicians and Medica' School Deans practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are in training in the specialty of obstetrics and gynecology.

Amici submit this brief in order to demonstrate for the Court the detrimental impact the Pennsylvania law would have on the health and welfare of women in need of abortions.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Appellees.

Section 3205 of the Pennsylvania Abortion Control Act, requiring that certain information be given to every woman requesting an abortion, both in its bias and inflexibility, violates the standards set by this Court in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 442-49 (1983), for laws purporting to secure "informed consent" to abortion. Moreover, by requiring physicians to act as the couriers of the state's ideological message on abortion, the section violates the first amendment.

Section 3206 of the Act, requiring parental consent for abortion, violates standards established by this Court because it fails to set forth a sufficiently detailed procedure that guarantees confidentiality and expedition for minors attempting to utilize the courts to bypass parental involvement. *Bellotti v. Baird*, 443 U.S. 622 (1979).

Section 3214 of the Act, mandating separate reports and public disclosure of individual abortions, is unconstitutional because it would increase the cost of abortions and because of the violence against patients and clinic personnel which may result from such disclosure.

Section 3210(b), requiring that abortion techniques likely to result in live birth be used after viability unless they would pose "significantly greater" medical risk to the woman, unconstitutionally requires women to risk their life and health to benefit the fetus. Moreover, the section is unconstitutionally vague in failing to give physicians notice of what degree of risk their patients are required to bear.

Section 3210(c), which requires the presence of a second doctor where there is a possibility of the fetus "surviving" the abortion, is unconstitutional because it fails to make an exception for emergencies.

ARGUMENT

I. THE INFORMED CONSENT PROVISIONS OF THE PENNSYLVANIA ACT ARE UNCONSTITUTIONAL

A. The Informed Consent Provisions Of The Pennsylvania Act Significantly Interfere With A Woman's Right To Abortion

Although the state may attempt to ensure that a woman makes the decision between abortion and childbirth in an informed and voluntary manner, it does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 443 (1983). In *Akron*, this Court articulated two tests for the constitutionality of laws requiring "informed consent" for abortion. First, the state may not require that a woman be given non-informative irrelevant information designed to dissuade her from having an abortion. 462 U.S. at 444. The second test has more sweeping implications: while the state may prescribe the general areas to be discussed, it may not prescribe the specific information to be given, for to do so fails to give the physician leeway to tailor the information to the needs of the individual patient. *Id.* at 445. *See also Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 362-63 (6th Cir. 1984) (state may not prescribe content of abortion counseling). The Pennsylvania law, both in its bias and inflexibility, fails both tests.[1]

1. *Section 3205(a)(1)(ii)—Unforeseeable Risks*

The Pennsylvania law requires that the clinician recite to every patient desiring an abortion a statement that "there may be detrimental physical and psychological effects which are not accurately foreseeable". As an inflexible script which must be recited to each patient regardless of her individual circumstances, it obviously violates the second prong of the *Akron* test. 462 U.S. at 445.[2] Its bias and irrelevance are even more glaring defects, however.

1 Although the sections which follow outline objections to individual items of the informed consent requirement, *amici* agree with the court below that the entire section falls as a whole. *American College of Obstetricians and Gynecologists, Pennsylvania Section (A.C.O.G.) v. Thornburgh*, 737 F.2d 283, 296 (3d Cir. 1984).

This statement gives the woman no useful information whatsoever. It merely recites an axiom applicable to any activity in life: that it is attended with some element of unknowable risk. It does so, however, in a particularly unsettling form designed to give the impression that abortion is a dangerous operation fraught with undocumented perils. Quite the contrary is true. Massive studies on the epidemiology of abortion have rendered it, according to one expert, "the best-researched procedure in obstetrics and gynecology."[3] Abortion is also one

2 Although this Court upheld the identical provision contained in an earlier version of the Pennsylvania law, it did so by a summary affirmance which has little precedential value in this case. *Planned Parenthood Association v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd*, 428 U.S. 901 (1976). This Court has held repeatedly that summary dispositions affirm only the judgment, but not the reasoning of the court below. *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Mandel v. Bradley*, 432 U.S. 173 (1977).

The Court has not hesitated to disregard a rule upheld in a summary affirmance upon fuller consideration of the issues. *Fusari v. Steinberg*, 419 U.S. 379, 391-92, *reh'g denied*, 420 U.S. 955 (1975). Indeed, *Maher v. Roe*, 432 U.S. 464 (1977), decided after this Court summarily affirmed *Fitzpatrick*, effectively overruled *Fitzpatrick's* holding that the state must fund abortions since it funds childbirth.

The Court is even more likely to give little precedential weight to a summary affirmance when the lower court's decision was based on alternative grounds. In *Akron* the Court held that its summary affirmance of *Gary-Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd*, 451 U.S. 934 (1981) was not binding precedent on the second trimester hospitalization question. It disregarded *Gary's* ruling because the district court had decided the issue on the alternative ground of insufficient evidence. *Akron*, 462 U.S. at 433 n.18. In the instant case, the Court can likewise disregard the informed consent findings of *Fitzpatrick*. As in *Gary*, the district court in *Fitzpatrick* ruled on the alternative ground that plaintiffs failed to support their theory that the informed consent requirements chilled the woman's abortion option. 401 F. Supp. at 587.

3 Statement by Dr. Carol Hogue, chief of the pregnancy epidemiology branch of U.S. Centers for Disease Control, quoted in Pollner, *Abortion: Are Medicine and Law on a Collision Course?*, Medical World News, July 8, 1985, at 66, 89.

of the safest surgical procedures in modern medicine[4] and severe psychological sequelae have been shown to be rare.[5]

This requirement, therefore, has all the hallmarks of the propagandistic statements the Court struck down in *Akron*. It imparts no useful information and it exaggerates the danger of abortion for the sole apparent purpose of dissuading a woman from choosing to have one. It is, therefore, unconstitutional. *See Akron*, 462 U.S. at 444-45 (statement that "abortion is a major surgical procedure" and lengthy listing of abortion risks struck down as a " 'parade of horribles' intended to suggest that abortion is a particularly dangerous operation").

2. *Section 3205(a)(1)(iii)—Disclosure of Risks*

This section requires that certain abortion risks be disclosed to every patient, including the risk of "infection, hemorrhage, danger to subsequent pregnancies and infertility." In *Akron*, this Court rejected a substantially similar requirement because of its inflexibility. Specifically, "even if the physician believes that some of the risks . . . are nonexistent for a particular patient, he remains obligated to describe them to her." 462 U.S. at 445.

The Pennsylvania law is similarly inflexible. Although it requires that the risks be described only "when medically accurate," the statute fails to define that ambiguous term. Moreover, liability for failure to disclose a risk is imposed

4 The mortality rate for legally induced abortion is well documented. There were only 1.9 deaths per 100,000 legal procedures in the 1972-1980 period. U.S. Department of Health and Human Services, Centers for Disease Control: Abortion Surveillance 1979-80 at 10, 43 Table 20 (1983). Carrying a pregnancy to term is 7 times more dangerous than terminating a pregnancy prior to 16 weeks gestation; a routine tonsillectomy is 2 times and an appendectomy 100 times more risky than legal abortion. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization: Medical and Social Aspects 155, 168-71 (Hodgson ed. 1981).

5 Hall & Zisook, *Psychological Distress Following Therapeutic Abortion*, 9 Female Patient 168 (1984). Such disturbances are less frequent than those following childbirth. Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, 1 British Medical Journal 476 (February 1977). *See also* Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 Family Planning Perspectives 150, 153, 154 (1978) (predominant feeling following abortion in group surveyed was relief).

without regard to fault.[6] Physicians are therefore left to guess at the point when a risk becomes sufficiently established to require disclosure. The inevitable consequence will be that physicians will feel they must err on the side of caution in order to avoid liability, and disclose all risks, even anecdotal reports, for which there may be no statistically significant scientific evidence, without regard to their own professional judgment or the circumstances of the individual patient. *See Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979) (vague abortion statute with no scienter requirement failed to give physician the room necessary to make his best medical judgment).[7]

This intrusive effect of the statute is heightened by the fact that two of the medical risks singled out for inclusion in the list, the risks to subsequent pregnancy and the risk of infertility, are those for which the medical evidence is quite inconclusive.[8] Recent studies indicate no association between one induced abortion and subsequent pregnancy complications.[9]

6 Physicians are subject to revocation of their licenses to practice medicine and other persons are subject to being found guilty of a summary offense or a misdemeanor. 18 Pa. Cons. Stat. Ann. § 3206(c).

7 This Court has long recognized the principle that vague statutes cause persons to "steer far wider of the unlawful zone" and avoid conduct which would otherwise be constitutionally protected. *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n.6 (1982) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

8 By contrast, the risk of hemmorhage and infection is a known risk of abortions and disclosed to every patient by affiliates of *amicus* PPFA which perform abortions. Risk of danger to future pregnancies is explained as follows: "*Impact of Abortion on Subsequent Wanted Pregnancies*—At this point there is no clear evidence that one early abortion carries any risk to future pregnancies. Women who have had two or more such abortions may have an increased risk of premature deliveries or miscarriages in future pregnancies. Some studies have shown this effect, while others have not." The risk of infertility is mentioned only in the context of the possibility of perforation of the uterus requiring hysterectomy. Planned Parenthood Federation of America, Manual of Medical Standards and Guidelines, Part One, Section VII-E (revised January 1984).

9 Hogue *et al.*, *Impact of Vacuum Aspiration Abortion on Future Childbearing: A Review*, 15 Family Planning Perspectives 119 (1983); *see also* Linn *et al.*, *The Relationship Between Induced Abortion and Outcome of Subsequent Pregnancies*, 146 Am. J. Obstet. and Gynecol. 136 (1983).

Some evidence, however, links abortion by dilatation and curettage (D & C) (as opposed to the more common vacuum aspiration procedures) with miscarriages,[10] or low birth weights[11] in subsequent pregnancies. Studies are evenly divided on the impact of multiple abortions on future reproductive complications.[12] The evidence linking abortion to infertility is even more conjectural. Most studies show no impact on fertility;[13] although some studies do show a link between subsequent infertility and D & C abortion.[14] The statute's vagueness coupled with its imposition of strict liability gives the physician little room to adjudge the validity of these studies or their conclusiveness in establishing risk. Such inflexibility is unconstitutional under the standards set by this Court in *Akron*.

3. *Section 3205(a)(1)(v)—Risks of Childbirth*

This section requires that every woman requesting an abortion be told "the medical risks associated with carrying her child to term." This information may be relevant for some women seeking abortion: for example, those seeking abortion because a continued pregnancy endangers their health or those seeking abortions late in pregnancy when the danger of the procedure approaches the danger of normal childbirth. For many women, however, including women in normal health

10 Hogue *et al.*, *supra* note 9, at 123.

11 Slater *et al.*, *The Effect of Abortion Method on the Outcome of Subsequent Pregnancy*, 26 J. of Reproductive Medicine 123 (1981).

12 Hogue *et al.*, *supra* note 9, at 119.

13 *Id. See also* World Health Organization, Task Force on Sequelae of Abortion, *Secondary Infertility Following Induced Abortion*, 16 Stud. Fam. Plan. 291 (1984); Stubblefield, *et al.*, *Fertility after Induced Abortion: A Prospective Follow-Up Study*, 63 Obstetrics and Gynecology 186 (1984) (This Boston study conducted between 1976 and 1979 compared 1,235 women who had obtained legal abortions, with 912 women who had delivered babies and 939 others who had obtained ob/gyn care. The investigators found no significant difference among all the women's ability to conceive.)

14 Hogue *et al.*, *supra* note 9, at 119.

who have reached a firm decision to have an abortion early in pregnancy, when early abortion is seven times safer than childbirth,[15] the information is medically irrelevant. And for other women, including those seeking abortion because of rape or incest or because they are carrying a defective fetus, the information is both irrelevant and punitive.

By contrast, pregnancy options counseling by affiliates of *amicus* PPFA allows counselors to explore the alternatives for management of a problem pregnancy to the extent desired by the woman, without subjecting her to a state-prescribed lecture on pregnancy and childbirth.[16] Because the Pennsylvania statute fails to give physicians and clinicians leeway to make these individual judgments, it is unconstitutional. *Akron*, 462 U.S. at 445. *Accord Women's Services P.C. v. Thone*, 483 F. Supp. 1022, 1049 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980).

4. *Section 3205(a)(2)(i)—Information on Medical Assistance*

This section requires the woman to be informed that medical assistance may be available for prenatal care, childbirth and neonatal care. This provision is constitutionally objectionable for the same reasons as subsection (a)(1)(v). It is inflexible, requiring the rendition of information to every woman regardless of her circumstances or the status of her abortion decision. The information is misleading and irrelevant for some women: for example, those whose financial or immigration status clearly makes them ineligible for state aid[17] or those who have been explicitly turned down for such aid by state agencies. Yet, the statute allows the clinician no discretion whatsoever as to this statement. For this reason, this statutory requirement also violates the dictates of *Akron*.

15 *See supra* note 4.

16 Manual of Medical Standards and Guidelines, *supra* note 8, at Part One Section VII-C (revised January 1984). PPFA's informed consent fact sheet for abortion merely contrasts the statistical mortality rates associated with early abortion and childbirth. *Id.* at Section VII-E.

17 *See, e.g.*, 42 U.S.C. §§ 1396(a),(n) (Supp. 1985) (amended 1984); 42 C.F.R. § 435.402 (1985).

5. *Section 3205(a)(2)(ii)—Father's Liability*

This section compels the clinician to tell each woman that "the father *is* liable to assist in the support of her child . . ." (emphasis added). This requires medical personnel to give legal advice which is inaccurate, misleading and insensitive to the woman's needs.

For example, in states which allow artificial insemination, the biological father who donates sperm is never responsible for supporting the child. Moreover, a father may not be liable if the mother wrongfully removes the child from the father's home, if the mother has custody and the divorce decree does not provide for support; or if there is no custody order because the child was born soon after the divorce and the child lives with the mother. Annot., 69 A.L.R.2d 203 (1960).

In addition, a woman hearing the declaration that the father is liable for support could mistakenly believe that child support is the father's primary obligation. In most states today, including Pennsylvania, the wife must contribute an amount proportional to her ability to pay. *See Straub v. Tyahla*, 274 Pa. Super. 411, 418 A.2d 472 (1980). The father may not be required to assist in supporting the child at all. Further, the Pennsylvania law ignores the fact that the father's liability may change in the future. Factors such as the father's incapacity, and the child's earnings, education and military involvement all affect the father's liability. Annot., 99 A.L.R.3d 322 (1980) (college); Annot., 39 A.L.R.3d 1292 (1971) (income); 32 A.L.R. 3d 1055 (1970) (military).

Finally, it would be especially cruel to remind rape and incest victims who have decided on abortion that the father is liable to support their child.

Requiring clinicians to make such an inflexible misleading statement does not serve the purposes of informed consent and is unconstitutional under *Akron*.

6. *Sections 3205(a)(2)(iii) and 3208—Required Distribution of Printed Information*

These sections require the clinician to tell a woman seeking an abortion that she has the right to review certain state authored materials. The clinician's statement regarding the

materials must be delivered orally and include the words "the materials describe the unborn child and list agencies which offer alternatives to abortion." § 3205(a) (2)(iii). If the woman elects to view the materials, the clinician must be available to explain them to her in her own language and read them to her if she cannot read. Moreover, the materials must include a statement that the state strongly urges the pregnant woman to contact the agencies before deciding on abortion.

The Pennsylvania law is nearly identical to the requirement this Court struck down in the *Akron* case that physicians orally describe fetal anatomy to the patient and inform her that her "unborn child is a human life from the moment of conception." 462 U.S. at 444. The *Akron* Court viewed these statements as propagandistic rather than informative, requiring physicians to engage in speculation in describing fetal anatomy and espousal of the state's theory of when life begins. *Id.*

Like the *Akron* law, the Pennsylvania statute requires the clinician to act as the state's anti-abortion mouthpiece. He or she must make a script-like oral statement on the "unborn child"[18] and hand over a state-prescribed lecture on fetal anatomy and the preferability of childbirth over abortion. The unconstitutionality of this section is not mitigated by the fact that the information is supplied by the state, is purportedly objective and is not, strictly speaking, required reading for the women. First, a mere recitation of objectivity does not guarantee it especially in view of the clear anti-abortion purpose of the statute. *See* 18 Pa. Cons. Stat. Ann. § 3202 (Legislative intent); *A.C.O.G. v. Thornburgh*, 737 F.2d at 288-89. More significantly, the physician is not a passive conduit for the state's anti-abortion diatribe.[19] Because he must explain the materials to the patient, even read them to her, he is inextricably bound up in their delivery. As one federal district court said in striking down a nearly identical Rhode Island law,

18 *See also Margaret S. v. Treen*, 597 F. Supp. 636, 661 (E.D. La. 1984) ("the term 'unborn child' . . . could increase a woman's guilt surrounding the abortion decision by implying that she is taking the life of a person").

19 One court viewed descriptions of fetal anatomy as inherently propagandistic in the context of abortion consent laws. "The primary purpose of the required information is not so much factual as it is moral." *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1022 (1st Cir. 1981).

> To say that the mandate of the Rhode Island statute merely insures that the patient knows such material is available is delusory. At a minimum, the doctor will have to relate what the materials are, who published them, and where they may be obtained. In many cases, depending on the curiosity of the patient at being informed of the existence of these state materials, a doctor may feel compelled to give an evaluation. Indeed, a woman patient may well decide whether or not to peruse the State's publications based on the evaluation she receives from her attending physician. The physician cannot play a passive role in this administering requirement. Such passivity might well be perceived as inconsistent with the doctor's role of medical advisor to the patient.

Women's Medical Center of Providence v. Roberts, 530 F. Supp. 1136, 1154 (D.R.I. 1982). In a similar manner, the state of Pennsylvania has here attempted to inject its anti-abortion sentiments into the physician-patient relationship.[20]

This section, in its inflexibility, also violates the second prong of the *Akron* test. Physicians must distribute the state materials to their patients regardless of their view of the materials' accuracy, relevance or medical advisability. This impedes physicians' ability to tailor the information to the individual patient's needs and thus violates the constitutional standards set by this Court. *See also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d at 1021-22; *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980); *Margaret S. v. Treen*, 597 F. Supp. at 662-63; *Women's Medical Center*, 530 F. Supp. at 1152-54 (requirements that physicians describe fetal anatomy struck down because that they impede physicians' ability to do what is best for their patients).

7. *Absence of Emergency Provision*

The informed consent provision is also unconstitutional because it fails to make an adequate exception for emergency situations in which rendition of the prescribed information

20 Although the State has a legitimate interest in promoting childbirth over abortion, *Harris v. McRae*, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980), it may not do so in a manner which, as here, directly intrudes upon the abortion decision. *Akron*, 462 U.S. at 444 & n.33.

would endanger the woman's life or health. The emergency exception is limited to situations in which an immediate abortion is necessary to avert the death of the mother. 18 Pa. Cons. Stat. Ann §§ 3303, 3305(b).[21] This limited definition is contrary to both constitutional and common law. Under the common law of torts, a risk to either the life *or health* of the patient may require emergency treatment obviating the need for informed consent.[22] Moreover, according to *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, a woman's life *and health* are always protected against state interference. *See id.* at 165; *Akron*, 462 U.S. at 428.

In summary, the Pennsylvania law directly and significantly interferes with a woman's abortion choice by burdening her physician with criminal penalties for failure to make statements which are biased, irrelevant and in conflict with his or her professional judgment. It therefore exceeds the permissible boundaries set by this Court for the otherwise important state interest in ensuring a woman's informed consent to abortion. It should be held unconstitutional.

B. The Informed Consent Provisions Abridge Physicians' First Amendment Rights

Sections 3205 and 3208 of the Pennsylvania law require physicians to foster the state's anti-abortion ideology in violation of their first amendment right to be free from government coerced speech in matters of belief, opinion and ideology.[23]

21 The medical emergency definition also waives the 24-hour waiting period if it would cause "grave peril of immediate and irreversible loss of major bodily functions." 18 Pa. Cons. Stat. Ann. § 3203. The 24-hour waiting period has been conceded to be unconstitutional by the appellants and it is not clear that this somewhat broader emergency exception would apply to the informed consent requirement standing alone. Even if it would, its definition of danger to health is unconstitutionally restrictive. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

22 A. Rosoff, Informed Consent: A Guide for Health Care Providers 14 (1981).

23 Sections 3205 and 3208 likewise abridge women's first amendment rights to refuse to listen to the state's ideological messages. By requiring all women to listen to this anti-abortion lecture as an absolute precondition of obtaining a legal abortion, these sections violate the first amendment rights of captive auditors. *See, e.g., Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952); *Lehman v. Shaker Heights*, 418 U.S. 298, 307 (1974).

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind" (citation omitted). . . .
>
> . . . where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

Wooley v. Maynard, 430 U.S. 705, 714, 717 (1977). *Accord West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Elrod v. Burns*, 427 U.S. 347 (1976). *See also Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting) (abortion consent laws may violate first amendment if they require physician to affirm state's ideology).

The informed consent provisions of the Pennsylvania Act require physicians to be the state's ideological courier on the abortion issue in a number of ways. In describing a state authored pamphlet on fetal development, physicians must orally refer to the fetus as an "unborn child", language which expresses the state's theory of when life begins. *See Roe v. Wade*, 410 U.S. at 159-62; *Akron*, 462 U.S. at 444. Physicians must also pass out a pamphlet describing fetal development and "strongly urging" the woman to contact maternal assistance agencies before deciding about abortion.[24] They must also describe abortion in a particularly unsettling manner, as involving dangerous unforeseeable risks or risks which remain hypothetical or medically unproven.

Such required statements are no different from the compulsory flag salute struck down in *Barnette*, 319 U.S. 624, or the license plate bearing the motto "Live Free or Die" which New Hampshire motorists were required by the state to display held unconstitutional in *Wooley v. Maynard*, 430 U.S. 705 (1977). They are an attempt by state officials to "prescribe what shall be orthodox in politics, nationalism, religion or

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24 *See also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d at 1022 (fetal description requirement struck down on first amendment grounds).

other matters of opinion [and to] force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. As such they must be held unconstitutional.

II. THE PARENTAL CONSENT PROVISION IS UNCONSTITUTIONAL

A. The Court Of Appeals Acted Correctly In Barring Implementation Of The Statute Until Rules Were Promulgated For Expedited And Confidential Procedures

The court of appeals held that the operation of Pennsylvania's requirement of parental consent for abortion should be enjoined until the state promulgated rules to assure confidentiality and expedition in judicial proceedings to waive the consent requirement. 737 F.2d at 297. *Amici* support this decision. As the court stated, "To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality and form." *Id. Accord Zbaraz v. Hartigan*, 763 F.2d 1537 (7th Cir. 1985); *Wynn v. Carey*, 582 F.2d 1375, 1389 (7th Cir. 1978); *Glick v. McKay*, No. CV-R-85-331-BCR (D. Nev. July 17, 1985).

The importance of specific procedures and timetables has been borne out in practice. For example, although the Missouri law upheld by this Court in *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), also directed the state courts to provide by rule for expedited appeals, no such rules had been made when in November 1983, a minor actually sought appellate review of a denial of her petition to waive the parental consent requirement. Consequently, her motion for expedited appeal was denied by the Missouri courts. She then had to turn for relief to the federal district court which restrained further implementation of the statute. *T.L.J. v. Ashcroft*, 585 F. Supp. 712 (W.D. Mo. 1983), *dismissed on other grounds*, May 29, 1985, *appeal docketed*, No. 85-1969 WM (8th Cir. June 6, 1985).

Moreover, in other states which generally provide for "expedited" proceedings but fail to mandate a specific timetable, untoward delays, caused by overcrowded dockets and the unwillingness of most judges to hear minors' abortion peti-

tions, have been reported.[25] Minors are forced to wait two to three days, even a week merely to schedule a hearing.[26]

This Court has noted the detrimental effects of delay on the health of a woman seeking abortion. *Akron*, 462 U.S. at 435. The health risks rise dramatically with each week an abortion is postponed.[27] For teenagers these delays are especially critical. Since a disproportionate number of very young women seek abortions late in pregnancy,[28] a delay of a week could put a teenager over the limit for an instrumental evacuation abortion such as vacuum aspiration or dilatation and evacuation (D & E).[29] She would then be required to abort the pregnancy by a labor induction abortion, which is more dangerous, painful, emotionally traumatic and expensive.[30] In addition, such procedures generally require hospitalization and only a small proportion of hospitals are willing to provide any second trimester abortions.[31] The added costs and diminished accessibility may well put an abortion out of reach for some teen-

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25 Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Family Planning Perspectives 259 (1983).

26 *Id.* These delays and other factors are currently part of "as applied" challenges to parental consent laws in Minnesota, *Hodgson v. State of Minnesota*, 3-81 Civ. 538 (D. Minn., filed July 30, 1981), and Massachusetts, *Planned Parenthood League of Massachusetts v. Bellotti*, No. 81-124 (Mass. Commonwealth Sup. Jud. Ct., filed April 17, 1981).

27 Mortality risks rise 30% on the average with each week an abortion is delayed. Tietze, Induced Abortion, A World Review, 1983 at 92 (5th ed. 1983).

28 Centers for Disease Control: Abortion Surveillance, *supra* note 4, at 6.

29 Grimes, *Second Trimester Abortions in the United States*, 16 Family Planning Perspectives 260, 264 (1984). (Physicians set various gestational limits on performance of D & E abortions: from 16 to 24 weeks.)

30 Kafrissen *et al.*, *Midtrimester Abortion: Intra-amniotic Instillation of Hyperosmolar Urea and Prostaglandin F2 alpha v. Dilatation and Evacuation*, 251 J.A.M.A. 916, 918-19 (1984).

31 Henshaw *et al.*, *Abortion Services in the United States, 1981 and 1982*, 16 Family Planning Perspectives 119, 125 (1984).

agers, especially in states which do not provide public funding for abortion.[32]

Although *amici* believe laws requiring parental consent for abortion are ill-advised, states which do put such laws into effect must be as explicit as possible in guaranteeing speed and privacy for minors attempting to use the judicial process to obtain a waiver of these requirements. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 644 (1979). The court of appeals should be affirmed.

B. The Procedures Promulgated By The Pennsylvania Supreme Court Do Not Meet Constitutional Standards

Although the Pennsylvania Supreme Court has now promulgated rules to govern minors' petitions for judicial authorization for abortions, these rules do not render the parental consent provision constitutional.

1. *The Rules Fail to Guarantee Confidentiality*

Rule 16-4 states that "all persons shall be excluded from the hearings except the applicant, her parents or persons standing in loco parentis, and such other persons whose presence is specifically requested by the applicant or her guardian." The regulations thus permit a minor's parents to be present at the hearing to waive parental consent.[33] This rule is clearly in conflict with this Court's holdings in *Bellotti II* and *Akron*. In both cases, parental consent laws were struck down as unconstitutional specifically because they contained provisions allowing parents to be present at the hearing. 443 U.S. at 646-47; 462 U.S. at 441 n.31.

2. *The Rules Fail to Guarantee an Expedited Procedure*

Although the Supreme Court Rules provide a timetable for procedures to waive parental consent, it is far from expedited.

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32 Only fifteen states and the District of Columbia provide generally for abortions in their Medicaid programs. Other states fund abortions only in extreme circumstances such as rape and incest or to save the woman's life .

33 Any doubt about the meaning of this Rule is dispelled by Appellants in their Brief. In explaining Rule 16.4 they state, "the proceeding shall be closed to all but essential persons such as the minor's parents." Brief for Appellants at 79.

Rule 16.7 allows the trial court to take three business days to rule, and, after perfection of the appeal, it allows the appellate court seven business days to decide on the minor's appeal. Thus, a delay of two to three weeks is built into any waiver procedure where a petition is denied. As shown in the preceding section, such delays can make abortions more dangerous and costly as well as less accessible. The delay contemplated by the Pennsylvania law is hardly the expedited procedure this Court envisioned in *Bellotti II*, 443 U.S. at 644, and *Ashcroft*, 462 U.S. at 491 n.16.

For all the foregoing reasons, the Pennsylvania parental consent law should be held unconstitutional.

III. THE REPORTING AND DISCLOSURE PROVISIONS OF SECTION 3214 OF THE PENNSYLVANIA ACT UNDULY BURDEN A WOMAN'S RIGHT TO ABORTION AND TO ASSOCIATION AND ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST

Section 3214(a) of the Act requires medical providers to submit to the state department of health a detailed individual report on each abortion performed. The report must include the name of the physician who performed the abortion and the facility where the abortion was performed; the name of the referring physician; the woman's age, race, marital status, and number of prior pregnancies; her political subdivision and state of residence; the date on which a pregnancy determination was made; the date of the medical consultation required under another section of the Act; the date of the abortion and the type of procedure performed; the date of the woman's last menstrual period and probable fetal gestational age; length and weight of the aborted fetus; any medical complications; and the method of payment for the procedure.

Additionally, § 3214(a) mandates the reporting of certain information specified in other sections of the Act, including the basis for the physician's determination after the first trimester of pregnancy that "the child is not viable", or, if he determines that the fetus is viable, the "basis for his determination that the abortion is necessary to preserve maternal life or health" (§ 3214(a)(8), cross referenced to § 3211(a)). Also required is the basis for the physician's judgment regarding

choice of abortion technique after the fetus is determined to be viable (§ 3214(a)(13), cross referenced to § 3210(b)).

Section 3214(b) requires the physician who performed the abortion to sign the report and submit it to the state department of health within 15 days after each reporting month. The entire report is then made available to the public for inspection and copying after a "unique identifying number" is substituted for each physician's name. Although the identity of the person filing the report is kept confidential (§ 3214(e)(2)), the identity of the facility where the abortion was performed is not.[34]

Additionally, § 3214(h) requires the reporting of medical complications from an abortion or attempted abortion, as well as additional information about the woman herself, and mandates public disclosure of the report, which includes the name and address of the facility where the abortion was performed.

A. The Public Disclosure Provisions Of § 3214 Render The Statute Unconstitutional.

1. *The Statute Violates the Woman's Right to Privacy*

Amici support the holding of the court of appeals that the nature and complexity of the reporting requirements of § 3214 constitute an impermissible burden on the woman's right to choose abortion. *A.C.O.G. v. Thornburgh*, 737 F.2d at 302. Additionally, *amici* urge affirmance of the court of appeals' holding because public disclosure of such detailed information unconstitutionally intrudes upon a woman's right of privacy in deciding whether to have an abortion, as well as her right to associate with a particular physician or medical facility in order to effectuate this decision. These constitutional rights are threatened because the compelled disclosure of detailed information concerning the woman and the identity of the facility where each abortion is performed could easily lead to the identification of both the woman and her physician by members of the public, thus subjecting women, their physicians and clinic personnel to acts of violence, intimidation and harassment by those opposed to abortion.

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34 Because the statutory definition of "facility" includes a physician's office (§ 3203), the confidentiality of the physician's name cannot be ensured.

Public disclosure raises the alarming possibility that the woman herself will be identified. Detailed information in the report, including the abortion patient's race, age, area of residence, and the dates of her medical consultation and abortion, as well as the identity of the facility and details of the abortion procedure, can be compared with information obtained from the license plate numbers of cars parked at clinics and photographs of patients taken by abortion opponents during clinic demonstrations.[35] The real possibility that particular women can thus be identified constitutes an unwarranted invasion of the individual's privacy interests. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Whalen v. Roe*, 429 U.S. 589 (1977). Harassment of women, their physicians, and clinic personnel adversely affects the delivery of medical services and infringes upon the physician's right to exercise his or her medical judgment free from undue interference. *Roe v. Wade*, 410 U.S. at 163; *Doe v. Bolton*, 410 U.S. at 191-92; *Colautti*, 439 U.S. at 387.[36]

The constitutional privacy rights sought to be shielded here are no mere abstractions. Armed with the identities of facilities, physicians and patients, anti-abortion foes in this country are prepared to wreak havoc in their determination to stop legal abortion.

Incidents of violence and harassment directed against abortion providers, their patients and staff have risen dramatically since the beginning of 1984. In 1984 alone, there were 28 reported bombings and arson attacks against abortion providers—up from a total of 10 such incidents in the two preceding years combined.[37] The first four months of 1985

35 *See infra* description of the tactics of anti-abortion opponents, at 22-23.

36 As this Court stated in *Colautti*, 439 U.S. at 387, "*Roe* stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out . . . [and] *Roe's* companion case, *Doe v. Bolton*, underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment."

37 The Washington, D.C. offices of the National Abortion Federation and the American Civil Liberties Union were also bombed in 1984. *Attacks on Reproductive Health Facilities*, 5 Planned Parenthood Review 16 (1984/85).

have seen eight such reported incidents.[38]

Physicians and staff at clinics providing abortion services have received repeated death threats from abortion opponents.[39] Abortion providers are also the targets of frequent bomb threats which disrupt the provision of medical services and sometimes necessitate the evacuation of staff and patients in the midst of scheduled medical procedures.[40]

Violent and hostile protests at reproductive health care clinics are also increasing in number and intensity.[41] Patients and staff entering these facilities have been confronted with protestors who scream obscenities, threaten them with abusive language, and accuse them of being murderers, mercenaries, butchers, and baby-killers. Many demonstrators chant and sing loudly, using bullhorns and other amplification devices that can be heard inside medical facilities. Placards and leaflets depicting dismembered fetuses and inscribed with inflammatory language and epithets are waved in a threatening manner and thrust at people who attempt to enter the clinic. Demonstrators have also blocked clinic ingress and egress, stopped cars entering the premises, occupied parking space reserved for clinic patients, formed human chains in front of and around medical facilities, and physically pushed, shoved and grabbed patients and staff.[42] Other harassment has included clinic "invasions" and "sit-ins" by protestors who force their way

38 The Other Side: A Report On Clinic Violence, Harassment and Other Anti-Abortion Activities (June 1985) (Internal Planned Parenthood Publication).

39 N.Y. Times, Aug. 11, 1985, § 6 (Magazine), at 18.

40 *American College of Obstetricians and Gynecologists, Pennsylvania Section (A.C.O.G.) v. Thornburgh*, No. 82-4336, slip op. at 32 (E.D. Pa. June 17, 1985).

41 *Id.* at 25-26, 31-32.

42 *See, e.g., Feminist Women's Health Center v. Women Exploited by Abortion*, No. 83-2-04152-8 (Super. Ct. Wash. 1984); *Women's Health Care International v. Jackson County Right to Life*, No. 45,301 (Ch. Ct. Miss. 1984); *Planned Parenthood of Monmouth County v. Cannizzaro*, No. C-2416-84 (Super. Ct. N.J. 1984); *Parkmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dep't 1982).

into clinics, where they harass staff and patients and disrupt the provision of medical services.[43]

More significantly, anti-abortion protesters aim their tactics at individual physicians, staff and abortion patients. They photograph and videotape patients entering the clinic, record the license plate numbers on cars parked at the clinic in order to obtain the owners' names and addresses, call out to staff members by name and display their names on signs and placards, and picket the personal residences of physicians and staff.[44]

Such tactics are openly promoted by leaders of the anti-abortion movement. In his recent book, the director of the Pro-Life Action League devotes dozens of chapters to the "how-tos" of harassment of individuals and clinics, as well as clinic demonstrations and invasions.[45] Among other things, he advocates the hiring of private detectives to track down pregnant women who intend to have abortions and even professes to having done so. Tactics such as these, because they involve the identification and harassment of individual women, are particularly disturbing.

Another anti-abortion activist has used confidential hospital information to contact women who had been scheduled for abortions in an effort to "counsel" and dissuade them from undergoing the procedure.[46] In a separate incident, the mother

43 *A.C.O.G. v. Thornburgh*, slip op. at 11-12.

44 *See, e.g., id.* at 10, 12-13, 16; *Feminist Women's Health Center*, No. 83-2-04152-8; *Clinic For Women v. Citizens for Life*, No. 83-2651 (Cir. Ct. Ind. 1983); *Planned Parenthood of Monmouth County*, No. C-2416-84.

45 J. Scheidler, Closed: 99 Ways to Stop Abortion (1985). To prevent women from having abortions, the author encourages opponents of abortion to pose as patients in order to gain access to the clinic and disrupt the provision of services, utilize "telephone teams" to flood clinic telephone lines and schedule appointments, and leave "educational" messages about the "crime of abortion" on the clinics' after-hour tapes so as to prevent women seeking abortions from leaving messages. Also encouraged is the use of "horror stories" and "inflammatory rhetoric" to describe the "death camps" and "holocaust" of legalized abortion, signs and placards depicting dismembered fetuses, and effigies of public figures who have upheld or supported a woman's fundamental right to abortion.

46 Spake, *The Propaganda War Over Abortion*, Ms. Magazine, July 1985, at 88.

of a woman was notified by abortion opponents that her daughter had had an abortion. A phone call to the mother was followed by a letter stating the same information and naming one of the doctors who participated in the procedure. The letter, signed "Pro-Life", was followed shortly thereafter by another letter soliciting contributions for the National Right to Life Committee.[47]

Even the state of Pennsylvania recognizes that patient care may suffer if physicians and clinics are harassed or threatened. Before enactment of the Abortion Control Act in 1982, the state's policy was to separate abortion records submitted by each facility from the cover sheet identifying the facility in order to avoid possible reprisals by those opposed to abortion.[48]

Courts have also recognized that women who are forced to face such harassment experience trauma and anxiety which complicate medical treatment and hinder their recovery. For example, in a recent decision involving other provisions of the same statute at issue here, the United States District Court for the Eastern District of Pennsylvania struck down a statutory requirement of public disclosure of the names of abortion facilities because it found that compelled disclosure would lead to increased harassment and adversely affect women seeking abortions.[49]

47 *See* Planned Parenthood Public Affairs Newsletter at 3 (April 20, 1984).

48 *A.C.O.G. v. Thornburgh*, slip op. at 4. *See* Joint Appendix at 50a—51a (parties' stipulation of fact that "[d]uring the past several years, numerous abortion providers, both in Pennsylvania and throughout the country have been the object of threatened violence or actual violence, including firebombings, arson, shootings, vandalism, sit-ins and demonstrations.")

49 Sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act mandated public disclosure of the identity and location of abortion facilities and affiliated organizations as well as the total number of abortions performed at each facility and the number performed in each trimester of pregnancy. *See also Feminist Women's Health Center*, No. 83-2-04152-8 (clinic and individual harassment by abortion opponents created a stressful atmosphere which increased medical risks to the patients, affected physician performance, caused staff to resign, and resulted in cancelled appointments and no-shows).

2. *The Statute Unduly Burdens the Right to Association*

The harassment to which the Pennsylvania law subjects women, their physicians, and medical facilities, burdens the woman's right to associate with the physician or facility of her choice as well as her fundamental right to abortion. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), this Court held that public disclosure requirements such as those at issue here were unconstitutional because such disclosure would subject the persons identified to threats, harassment or reprisals. *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

> The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. . . . The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. at 93 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

Here, as in *Brown*, there is a "reasonable probability" that the disclosure requirements of § 3214 will subject women seeking abortions and the staff and facilities where abortions are performed to increased threats, harassment or reprisals. Past violence against clinics which provide abortion services and harassment of women seeking abortions and of the physicians and staff of these clinics is well documented and the evidence points to a rise in the number and level of violent and hostile confrontations.

3. *No State Interest Justifies the Intrusion on Constitutional Rights*

No state interest—compelling or otherwise—justifies the instrusion on the rights to abortion and association worked by this law. While this Court has recognized that recordkeeping requirements may be appropriate and useful to the state's

interest in preserving maternal health, *Danforth*, 428 U.S. at 81, it has repeatedly held that such reports must be confidential in order not to compromise the privacy interests involved. In *Danforth*, this Court upheld certain state reporting requirements because, *inter alia*, the reports were not available for public inspection: "[t]he added requirements for confidentiality, with the sole exception for public health officers . . . assist and persuade us in our determination of the [statute's] constitutional limits." *Id.* at 81-82. *See also Whalen v. Roe*, 429 U.S. 589 (1977).

Appellants' argument that the information reported pursuant to § 3214 "must be made available if it is to be useful" (Brief for Appellants at 63, n.21) begs the question of who should have access to this information. The state can achieve its stated objective of protecting the health of its citizens by requiring medical facilities to prepare statistical compilations of relevant health data for use by state health officials. Making detailed individual reports available to members of the general public, however, does not further any legitimate state interest.

Unlike the reporting provisions upheld in *Danforth*, the Pennsylvania Act mandates public disclosure of information that would impact adversely upon the constitutional rights of women seeking abortions and upon physicians and medical facilities which provide abortion services. Because there is no state interest which justifies public disclosure of this information, subsections (a), (b), (e) and (h) of § 3214 of the Pennsylvania Act are invalid.

B. The Requirement That Physicians Report the Basis For Their Determination of Fetal Non-Viability After the First Trimester Is Unconstitutional

Amici support the court of appeals holding that the requirement that a physician report the basis for his determination that "a child is not viable" as to abortions performed subsequent to the first trimester (§ 3214(a)(8), cross referenced to § 3211(a)) violates this Court's directive that a physician be accorded broad discretion in making such determinations, chills physician willingness to perform abortions and does not further any important state interest. *A.C.O.G. v. Thornburgh*, 737 F.2d at 302.

This Court has stressed repeatedly the importance of affording the physician adequate discretion in the exercise of his or her medical judgment, including the determination of the point at which a particular fetus is viable. *Colautti*, 439 U.S. at 388-89. *See also Danforth*, 428 U.S. at 64.

Yet the Pennsylvania legislature has usurped the broad discretion vested in physicians by enacting a law which presumes that the fetus is viable subsequent to the first trimester of pregnancy unless the attending physician reports the basis for his or her determination otherwise. (The statute does not require the physician to report the basis for his or her determination that the fetus is viable).

Section 3211(a) also sweeps unnecessarily broadly by requiring the reporting of the basis for determination of fetal non-viability as to abortions performed at a point in the pregnancy when there is not even a remote chance of viability. *See Danforth*, 428 U.S. at 83; *Colautti*, 439 U.S. at 389. During most of the second trimester of pregnancy, the possibility of fetal viability is nil, and even at the end of this period (22-24 weeks), viability is only an extremely remote possibility.[50]

Physicians whose medical judgment regarding second trimester non-viable fetuses will be scrutinized by the State and who face professional and criminal sanctions for non-compliance with the statute will be chilled from performing abortions after the first trimester. *Colautti*, 439 U.S. at 396; *A.C.O.G. v. Thornburgh*, 737 F.2d at 302.

Amici also agree with the court of appeals holding that there is no important state interest furthered by requiring physicians to make a report under § 3211(a) as to abortions of non-viable fetuses in the second trimester. 737 F.2d at 301. The state's compelling interest in protecting fetal life arises at the point of viability, which usually occurs sometime in the third trimester of pregnancy. *Roe v. Wade*, 410 U.S. at 160. Even if, as appellants contend, "it is untenable to suggest that the State

50 The court of appeals noted that appellants adduced no evidence to the contrary. *A.C.O.G. v. Thornburgh*, 737 F.2d at 301. *See* Dunn and Stirrat, *Capable of Being Born Alive?*, 1 Lancet 553 (1984). This Court has noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe v. Wade*, 410 U.S. at 160.

may not require verification of the basis for *third-trimester abortions*" to further its interest in protecting fetal life (Brief for Appellants at 64, n. 21) (emphasis added), such verification is unwarranted during the second trimester.

IV. SECTION 3210(b)'s FETAL PROTECTION PROVISION IS UNCONSTITUTIONAL

This section of the Pennsylvania Act requires a physician to choose the post-viability abortion technique which provides the best opportunity for the fetus to be "aborted alive" unless it would pose "significantly greater" medical risk to the life or health of the pregnant woman. 18 Pa. Cons. Stat. Ann. § 3210(b). The court of appeals rejected appellants' contention that the term "significantly" should be construed as mere surplusage and held the statute unconstitutional because it requires the woman to risk her health in order to benefit the fetus. 737 F.2d at 300 (citing *Colautti*, 439 U.S. at 400). *Amici* support the court of appeals' construction of the statute and its constitutional conclusion.

In their brief to this Court, appellants attempt to minimize the impact of the statute. They claim that, even if it is read as appellees claim it should be—to give the word "significant" a quantitative meaning and thus render the provision unconstitutionally burdensome—the restrictions placed on abortion practice are merely theoretical because "there simply is no evidence that there are alternative post-viability abortion methods with marginal, but not significant . . . relative risks to women." Brief for Appellants at 87. This argument distorts the very real impact which the statute would have on physicians attempting to protect their patients' health and at the same time steer clear of criminal prosecution.

In the extremely rare case of a very late abortion[51] the physician must make a difficult choice among abortion

51 For the purposes of this brief it is assumed that the statute has its earliest application between the 22nd and 24th weeks of pregnancy. The earliest known survivors of premature delivery are at 23 weeks. Dunn and Stirrat, *supra* note 50, at 554. Whether a fetus would be viable at this point would, however, be a judgment for the attending physician based on the facts of the case before him. *Colautti*, 439 U.S. at 396.

Since 1975, one percent or fewer of abortions are performed at 21 or more weeks gestation. Grimes, *supra* note 29. A group of investigators in Georgia

methods.[52] The relative risk of various methods is not fully established,[53] partly because the number of cases is so small.[54] Contrary to appellants' unsupported assertion, what data there are show that a number of methods are quite close together in terms of risk of death[55] and overall risk of serious complications, but differentiable in terms of particular risks and other health factors which may be relevant to an individual patient's case.[56] The serious criminal penalties attendant upon error will lead physicians to hesitate to base their medical judgment on these factors, which, while perhaps not dramatic epidemiologically, would make a real difference to the health of individual women.

Moreover, the effect of the provision is exacerbated by its vagueness. Since "significantly greater" is not defined, physicians are left guessing what quantum of risk will clear the statutory hurdle. Inevitably the result will be that physicians will give the statute its widest possible berth, favoring fetus-preserving abortion methods over those which could enhance the woman's health. This is precisely the result this Court sought to avoid in *Colautti*, 439 U.S. 379. In that case, the Court struck down the predecessor to this law in part because

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found that abortions are hardly ever performed at 25 weeks gestation or later. Spitz *et al.*, *Third-Trimester Induced Abortion in Georgia, 1979 and 1980*, 73 Am. J. Pub. Health 594 (1983).

52 *See generally* Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion, Perspectives after a Decade of Experience 119-20 (Berger *et al.*, eds. 1981).

53 This contrasts with abortions at an earlier stage of gestation where certain techniques have been established as far superior to others. For example, instrumental evacuation procedures up to the 16th week are clearly safer than labor induction abortion, Grimes, *supra* note 29, and vacuum aspiration is safer than surgical curettage in the first trimester. Tietze, *supra* note 27, at 88.

54 *See, e.g.*, Centers for Disease Control: Abortion Surveillance, *supra* note 4, at 11.

55 *See* Grimes, *supra* note 29.

56 Binkin *et al.*, *Urea-Prostaglandin versus Hypertonic Saline for Instillation Abortion*, 146 Am. J. Obstetrics and Gynecology 947, 952 (1983).

of its vagueness and in part because it appeared to require physicians to make a "trade-off" between fetal survival and the patient's health. *Id.* at 400. *See also United States v. Vuitch*, 402 U.S. 62, 71-72 (1971); *Doe v. Bolton*, 410 U.S. at 192 (patient's health broadly defined to include psychological and physical well-being).

As an example, an abortion utilizing prostaglandins is probably the most likely method to lead to a surviving fetus.[57] Yet this method is now rarely used as a sole abortifacient,[58] in part because it has been shown by most, but not all, studies to have a higher rate of major complications than other methods;[59] because of its severe gastro-intestinal side effects;[60] and because it entails a longer period between administration of the abortifacient and expulsion of the products of conception than other available methods of labor induction abortion,[61] resulting in more pain and discomfort for the patient.[62] Yet, physicians will be placed in a quandary as to whether these differences in risk meet the statutory test.

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57 Grimes, *supra* note 29, at 264. Hysterotomy is also more likely to lead to live birth but it is now rarely used. *Id.*

58 Grimes & Cates, *The Brief for Hypertonic Saline*, 15 Contemporary Ob/Gyn 29, 38 (1980). Prostaglandins are more often used as an adjunct to other abortifacients, such as urea. *Id.*

59 *Id. But cf.* Cates *et al.*, *Dilatation and Evacuation Procedures and Second Trimester Abortions: The Role of Physician Skill and Hospital Setting*, 248 J.A.M.A. 559, 560-61 (1982); Robins & Surrago, *Alternatives in Midtrimester Abortion Induction*, 56 Obstetrics and Gynecology 716, 719-20 (1980).

60 Robins & Surrago, *supra* note 59.

61 An abortion utilizing urea and prostaglandin produces abortion faster than prostaglandins alone. Wilson, *Mid Trimester Abortion with Urea, Prostaglandin F2 alpha, Laminaria and Oxytocin: A New Regimen*, 51 Obstetrics and Gynecology 699 (1978).

62 Binkin *et al.*, *supra* note 56, at 952.

Because the Pennsylvania statute leaves the physician no room to make the necessary professional judgment in this difficult area without fear of criminal prosecution, it is unconstitutional. *Colautti*, 439 U.S. at 400-01; *Danforth*, 428 U.S. at 67 n.8.

V. THE SECOND PHYSICIAN REQUIREMENT IS UNCONSTITUTIONAL

This section requires the attendance of a second physician at any abortion that does not preclude the possibility of fetal survival. 18 Pa. Cons. Stat. Ann. § 3210(c). *Amici* support the court of appeals' holding that the provision is unconstitutional because it fails to make an exception for emergencies. 737 F.2d 283 at 300-301; *Ashcroft*, 462 U.S. at 485 n.8 (Powell, J.) and 501 (Blackmun, J., concurring).

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be affirmed.

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OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,
Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL ABORTION FEDERATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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N.Y. Times, Aug. 11, 1985 (Magazine), at 18	12
Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. Cinn. L. Rev. 501 (1979)	15
Pa. Doctor Resigns from N.Y. Abortuary After Private Practice Is Picketed, ALL News, May 3, 1985, at 3	18
Pensacola Abortionist Quits; Faced Insurance Problems, Eviction, ALL News, June 28, 1985, at 1	18
Picketers Target Doctors' Offices; Two Doctors Stop Doing Abortions, ALL News, Mar. 29, 1985, at 2	18
Restatement (Second) of Torts § 564 comment b (1977)	23
San Diego Abortuary Burned Again—$25,000 in Damages Sustained, ALL News, Apr. 19, 1985, at 3	18
J. Scheidler, *Closed: 99 Ways to Stop Abortion* (1985)	*passim*
Sobran, *Sudden Impact*, Nat. Rev. 41 (June 28, 1985)	10
Third Abortion Clinic Bomber Sentenced to 15 Years, Wash. Post, July 27, 1985, at D1	1
Willke, *Opposing Clinic Violence*, Nat. Right to Life News, Jan. 10, 1985, at 3	13

BRIEF FOR THE NATIONAL ABORTION FEDERATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The National Abortion Federation ("NAF") submits this brief in support of appellees.[1] NAF, a not-for-profit professional organization, was founded in 1977 and is composed primarily of clinics and physicians providing abortion services. Currently, NAF members include 306 providers in 46 states, the District of Columbia, Puerto Rico and Canada, including three of the five original plaintiffs, now appellees, in this case.[2] NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards,[3] guidelines, training and education and serves as a clearinghouse for information and advice to abortion-service professionals and the general public.

NAF's headquarters in Washington, D.C. were firebombed by self-professed antiabortionists on July 4, 1984.[4]

THE QUESTION ADDRESSED BY THIS BRIEF

This brief addresses the unconstitutionality of Pennsylvania's public disclosure requirements for reports filed by providers of abortions under § 3214(a) and (h) of the 1982 Pennsylvania Abortion Control Act. NAF submits that the disclosure requirements are unconstitutional under the standards set forth in *Roe v. Wade*,

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[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

[2] The NAF members are the Elizabeth Blackwell Health Center for Women; Reproductive Health and Counseling Center; and Women's Health Services, Inc.

[3] Copies of NAF *Standards for Quality Care*, reprinted as of April 1984, are being lodged with the Clerk of the Court.

[4] *See Summary of Clinic Violence as Reported to the National Abortion Federation*, discussed *infra* p. 13. Two antiabortionists pled guilty and a third was convicted for ten bombings, including that of NAF's headquarters. *See Third Abortion Clinic Bomber Sentenced to 15 Years*, Wash. Post, July 27, 1985, at D1.

410 U.S. 113 (1973), and its progeny in this Court, for reasons in addition to those relied upon by the court of appeals below.

In this brief, NAF demonstrates that Pennsylvania's disclosure requirements would expose physicians, women who choose abortion and abortion clinics to antiabortionist violence and harassment. The materials discussed below, of which this Court may take notice, establish that bombings, arsons, death threats, assaults and clinic invasions are escalating dramatically. This brief explains how Pennsylvania's public disclosure requirements will help antiabortion activists to target physicians, other abortion providers and women who choose abortion for even more violence and harassment. It also shows still other adverse effects of public disclosure, the lack of any need for it, and Pennsylvania's departure from accepted practices relating to medical records.

STATEMENT

A. The Public Disclosure of Information Concerning Abortions Required by the 1982 Pennsylvania Abortion Control Act

The 1982 Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983) (hereinafter cited as "1982 Act"), requires providers of abortion services to submit to the Pennsylvania Department of Health four types of reports that are to be available for public inspection and copying. These publicly available reports contain detailed information about each abortion performed in Pennsylvania, the patient and the provider of the abortion. Penalties for failure to file the required reports include fines, suspension or revocation of licenses, and criminal liability. The reporting and public disclosure provisions of the 1982 Act apply equally to abortions performed in the first, second and third trimesters.

The provisions requiring two of these four types of reports were held unconstitutional by the court of appeals and are therefore before this Court:

(1) Section 3214(a) of the 1982 Act requires that a "report of each abortion performed shall be made to the [Department of Health] on forms prescribed by it."[5] Section 3214(b) requires the physician who performs the abortion to sign this report, and § 3214(e)(2) requires the Department of Health to make it available for public inspection and copying, subject only to the limitation that "a unique identifying number" be substituted for "the name of any physician which appears on the report." This report includes statutorily required information about the identity of the physician who performed the abortion, the facility where the abortion was performed[6] and any referring physician, agency or service; the political subdivision in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period and the probable gestational age of the "unborn child"; the date and type of procedure; a description of any complications; information relating to viability; length and weight of the "unborn child"; the basis for determination of "medical emergency" (if applicable); the date of the statutorily required medical consultation; the date of determination of pregnancy; and the method of payment for the abortion. The form promulgated by the Department of Health additionally requires information about the woman's education, the number of her living and dead children, and previous spontaneous and induced terminations of pregnancy.

(2) Section 3214(h) further requires physicians to file reports of any complications "resulting, in the good

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[5] Copies of the report forms promulgated by Pennsylvania's Department of Health pursuant to these subsections, entitled "Report of Induced Termination of Pregnancy," are reproduced in the Appendix to this brief.

[6] The public report may often identify private physicians performing abortions despite the substitution of a number because private physicians' offices where abortions are performed must be identified.

faith judgment of the physician, from . . . an abortion or attempted abortion." These reports, which § 3214(h) makes available for public inspection and copying, must state the age of the patient; the number of previous pregnancies; the number and type of previous abortions; the name and address of the facility where the abortion was performed; the gestational age of the "unborn child"; the type of abortion performed; the nature of the complications; the medical treatment given; and the nature and extent, if known, of any permanent condition caused by the complications.[7] This form, which must be signed by the physician, additionally requires information about the number of the woman's living and dead children, the date of the abortion, the date of the physician's first examination of the patient, and the physician's license number.

B. Pennsylvania Previously Protected the Confidentiality of Records About Abortion Providers and Their Patients

The 1982 Act replaced Pennsylvania's 1974 Abortion Control Act, 35 Pa. Cons. Stat. Ann. §§ 6601-6608 (Purdon 1977) (hereinafter cited as "1974 Act"). Section 6606(d) of the 1974 Act required abortion facilities to keep in their own files records of each abortion performed.[8] Section 6606(d) specifically provided that

[7] The form promulgated by the Department of Health, entitled "Abortions: Report of Complications," is reproduced in the Appendix to this brief.

[8] *Planned Parenthood Association v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. in part sub nom. Franklin v. Fitzpatrick and vacated and remanded mem. in part sub nom. Beal v. Franklin*, 428 U.S. 901 (1976), invalidated as unconstitutional the reporting provisions of § 6606(d) requiring the name and address of the patient's spouse; the name and address of the patient's parent or person *in loco parentis*; and a "full statement of those facts upon which the person performing the abortion relied as establishing that the abortion was necessary to preserve the life or health of the mother."

"[a]ll information and documents required by this subsection shall be treated with confidentiality customarily accorded to medical records."

Section 6606(e) of the 1974 Act further required each facility performing abortions to file quarterly reports with the Department of Health showing the total number of abortions performed during that quarter year and the total number of abortions performed in each trimester of pregnancy. In 1978, the Department of Health implemented a policy to delete the names of private practitioners providing abortion services from its publicly available lists, in order "to prevent those providers from possible harassment and abuse as has occurred in the recent past."[9]

Beginning in 1980, the Department of Health implemented a further policy to separate the abortion records submitted by all facilities from the cover sheets identifying the facilities.[10] This policy was implemented "to avoid the possibility that certain facilities and physicians could be pressured and possibly harassed by members of the public objecting to the medical abortion practice" and because the department recognized that it had "no need

[9] *See Department of Health Position on the Dissemination of Abortion Statistics*, marked as Exhibit A, and letters dated March 22, 1979 and April 24, 1979 between the Pennsylvania Secretary of Health and the Executive Director of the Office of the Democratic Policy Committee Chairman, marked as Exhibits B and C, copies of which are being lodged with the Clerk of the Court. These exhibits and others marked with letters have been reproduced from attachments to Plaintiffs' Memorandum of Law in Support of an Injunction Against Enforcement of the Public Disclosure Requirements of Sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act, filed in the district court in a subsequent phase of the present case.

[10] *See* the subsequent district court decision in this case, *American College of Obstetricians and Gynecologists v. Thornburgh*, Civil Action No. 82-4336, slip op. at 4 (E.D. Pa. June 17, 1985). Copies of this decision are being lodged with the Clerk of the Court.

to match the identity of the facility with its statistical report." [11]

C. Pennsylvania's Reversal of Previous Policy in Enacting the 1982 Act

The Pennsylvania Department of Health's 1980 policy frustrated a number of Pennsylvania legislators who sought to obtain information about abortion providers on behalf of their constitutents.[12] The disclosure requirements of the 1982 Act were designed to reverse this policy. The legislative history of the 1982 Act reflects the view that:

> [P]eople should have the right to know, for scientific reasons, the abortions that are being performed, at what stage, at what term, any complications, and in addition, they should have the right to know the organizations and individuals who are performing abortions so that they can decide whether or not to patronize these organizations and individuals.

77 Pa. Legis. J. House 2269-70 (Dec. 8, 1981). The legislative history specifically decries the problems encountered by one Pennsylvania legislator who previously had challenged the Department of Health's policy of separating the page of the report identifying the facility from the sheets containing the statistical information. As intended, the 1982 Act now requires the identity of abortion facilities and detailed information about those facilities to be publicly disclosed, along with the medical and personal

[11] *See id.* at 4, 43. Copies of the June 23, 1980 policy, identified as Exhibit D, are being lodged with the Clerk of the Court. The district court also cited a May 4, 1981 letter from the Chief Counsel of the Department of Health, Plaintiffs' Exhibit 7, copies of which are being lodged with the Clerk of the Court as Exhibit G.

[12] *See, e.g.*, Exhibit E (memorandum dated February 13, 1981 from the Chief Counsel of the Pennsylvania Department of Health reflecting a telephone call with a Pennsylvania legislator who challenged the department's policy) and Exhibit F (May 1, 1981 letter from the department's Chief Counsel to a Pennsylvania legislator explaining the department's policy). Copies of Exhibits E and F are being lodged with the Clerk of the Court.

histories of women choosing abortions, which were formerly protected as confidential medical records.

D. Proceedings Below

The proceedings below resulted in the court of appeals' holding many provisions of the 1982 Act unconstitutional, including the reporting requirements of § 3214(a), (b), (e) and (h) discussed in this brief. The court of appeals found that these reporting requirements would have a significant impact on the woman's abortion decision because they would increase the cost of abortions. Further, the court observed that the state had "proffered no compelling state interest to justify much of the detail required." *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 302 (3d Cir. 1984). The court noted "additional objections to some of the specific information required." *Id.* For example, "the compulsion that a physician report the basis for his or her medical judgment at various stages appears inconsistent with the [Supreme] Court's directive that a physician be accorded broad discretion, and could have a profound chilling effect on the willingness of physicians to perform abortions." *Id.* (citing *Colautti v. Franklin*, 439 U.S. 379, 396 (1979)). The court did not reach the questions whether these provisions also unconstitutionally invaded the privacy of the mother or impaired the exercise of abortion rights through public disclosure.

After remand, the United States District Court for the Eastern District of Pennsylvania held proceedings on the validity of §§ 3207(b) and 3214(f) of the 1982 Act, which require that abortion facilities be identified and that information about those facilities be made public. After hearing evidence on the effects of such disclosure, the district court entered an injunction requiring Pennsylvania to maintain in confidence, and not make available for public disclosure, reports filed pursuant to those sections. The district court's June 17, 1985 decision (hereinafter cited as "1985 district court decision") made

extensive findings of fact concerning harassment and acts of violence directed at abortion facilities and their patients. The court concluded that "there is a reasonable probability that the disclosure requirements will result in increased threats, harassment, or reprisals and will therefore impose a legally significant burden on the constitutional right to choose to have an abortion." Slip op. at 31.[13]

INTRODUCTION AND SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), and subsequent decisions of this Court establish and confirm the principle that during the first trimester of pregnancy, a woman "must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.'" *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429-30 (1983) (quoting *Roe v. Wade*, 410 U.S. at 163). Consequently, state regulations covering the first trimester, such as the disclosure requirements of the 1982 Act, are permitted only if they "have no significant impact on the woman's exercise of her right" *and* if "the State [meets] its burden of demonstrating that [the] regulations further[] important health-related State concerns." *Akron*, 462 U.S. at 429-30. Even after the first trimester, a state's regulation of abortion procedures must "reasonably relate[] to the preservation and protection of maternal health" and must not "depart from accepted medical practice." *Id.* at 430.

This Court has upheld certain recordkeeping and reporting requirements in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). The requirements in *Danforth* and *Ashcroft*, however, were "reasonably directed to the preservation of maternal health and . . . properly respect[ed] a patient's confidentiality and privacy," did

[13] The 1985 district court decision is not before this Court for review.

not "significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures," and were not unduly burdensome. *Danforth*, 428 U.S. at 80-81; *see also Ashcroft*, 462 U.S. at 490 n.14.

The court of appeals correctly held that the reporting requirements discussed in this brief, which concern individual abortions and complications, violated these constitutional standards. This brief additionally demonstrates that the provisions for public disclosure of such reports are unconstitutional because they improperly interfere with the abortion decision, violate patients' rights of privacy, and serve no valid state interest.

Pennsylvania's public disclosure requirements are especially distressing in light of the extensive evidence of antiabortionist harassment of and violence directed at abortion providers and their patients. The information to be disclosed permits targeting of abortion facilities for violence and harassment, thereby restricting access to safe abortions. In addition, the amount of detailed personal information required to be disclosed makes the woman who has chosen to terminate her pregnancy through abortion easily identifiable, thereby facilitating harassment of patients as well as violating their privacy rights. Moreover, the public disclosure requirements directly interfere with the abortion decision because a woman who does not wish to sacrifice her privacy right in maintaining the confidentiality of such information must sacrifice her independence in making the abortion decision.

Pennsylvania has not offered, nor could it offer, any compelling state interest to justify this interference with the abortion decision. Further, the disclosure requirements are inconsistent with the practices of other states, the federal government and professional organizations, which disclose only aggregate statistical information and strictly protect the confidentiality of information about specific facilities, physicians and patients.

DISCUSSION

I. THE PENNSYLVANIA DISCLOSURE REQUIREMENTS UNCONSTITUTIONALLY INTERFERE WITH THE ABORTION DECISION AND VIOLATE PATIENTS' PRIVACY

A. Public Disclosure of Sensitive Abortion Information Facilitates Antiabortionist Violence and Harassment

1. *The concerted program of violence and harassment directed against abortion providers and their patients*

In recent years, both women who seek abortions and physicians who provide abortions have been targets of a rising tide of antiabortionist violence and harassment. Many leaders of the antiabortion movement have shifted their emphasis away from advocating changes in the law to applying "direct action" against abortion providers and their patients. "[P]ro-life activists cannot wait for the legislative and judicial process that will make abortion illegal. . . . [T]he activities and methods proposed in this book are *intended* to interfere with and even stop the business of abortion. . . ." J. Scheidler, *Closed: 99 Ways to Stop Abortion* 17-18 (1985) (hereinafter cited as "*99 Ways*") (emphasis in original).[14]

> As head of the Pro-Life Action League, [Scheidler] . . . uses prayer, sidewalk counseling, sit-ins, graffiti, lawsuits, "inflammatory rhetoric," horror stories, ghastly pictures, pressure of all sorts.

Sobran, *Sudden Impact*, Nat. Rev. 41, 42 (June 28, 1985).

Abortion providers and their patients are subjected to harassment that includes:

[14] *See also It's Not Terrorism to Stop the Slaughter*, USA Today, Nov. 23, 1984, quoting Curtis Beseda, convicted of four counts of bombing and arson of abortion clinics, as stating that: "Direct action simply recognizes what in fact is taking place, that innocent human lives are being destroyed, and that the only appropriate response is one that stops this killing."

> blocking the entrances to clinics or clinic parking lots; threatening, harassing, intimidating, insulting, molesting, pushing, elbowing or shouldering patients or staff; peering into or shouting through clinic windows; trespassing on private property; invading clinics; shouting abusive epithets or obscenities at patients; photographing or videotaping patients; engaging in face-to-face harassment; using . . . voice amplification; interfering with or harassing patients or clinic staff at their homes; making phone calls intended to disrupt clinic operations; and making false appointments.

Donovan, *The Holy War*, 17 Fam. Plan. Persp. 5, 7 (1985) (hereinafter cited as "*The Holy War*").[15]

Numerous antiabortion groups espouse "direct action" to restrict and deny access to abortion services. In May 1984, more than 600 abortion foes held a three-day conference on how to close abortion clinics and discourage women from choosing abortion. *The Holy War* at 8. Attendees were urged to use direct action to "shut down the abortion industry." *Id.* (quoting W. Cumbie, National Conference on Pro-Life Activism, Fort Lauderdale, Fla., May 12, 1984). A second activist conference was held in Wisconsin in April 1985. *99 Ways* at 240.[16]

[15] Many of these tactics are openly advocated by Scheidler in *99 Ways*. *See, e.g.*, chapter 1 (Sidewalk Counseling); chapter 2 (Truth Teams) (couples who pose as clients for abortion to gain access to the waiting room in order to change patients' minds); chapter 3 (Picket and Demonstration); chapter 33 (Sit-Ins); chapter 37 (Picket the Abortionists' Homes); chapter 47 (Use "Inflammatory Rhetoric"); chapter 53 (Use Private Detectives); chapter 57 (Conduct a Blitz (clinic invasion)); chapter 58 (The Bullhorn); chapter 60 (Get Information from License Plates); chapter 86 (Special Clinic Closing Programs: Project Jericho, Three Month Blitz, and Others); chapter 90 (Make Appointments); chapter 91 (Telephone Calling).

[16] Many antiabortion groups pay no heed to the stage of the pregnancy, the cause of the pregnancy or the effect of the pregnancy on the life or health of the woman. For example, the ALL News, published by the American Life Lobby, Inc., recently carried

Antiabortionist harassment of physicians who provide abortion services is widespread. A recent article in the New York Times Magazine vividly describes the intimidating tactics aimed at one doctor who performs abortions in a small Oregon town. In addition to picketing the physician, antiabortionists have likened his clinic to Auschwitz, attempted to firebomb his clinic on two occasions, and mailed him threatening letters, one of which threatened to decapitate him.[17]

Antiabortionist violence was the subject of congressional hearings in March 1985. Directors of a number of abortion facilities testified about numerous instances of "malicious harassment and intimidation of clinic staff and patients and unlawful activities. . . ." *Abortion Clinic Violence: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (hereinafter cited as "*Hearings*") (statement of Beverly Whipple, Executive Director, Feminist Women's Health Center).[18] The Feminist Women's Health Center in Everett, Washington was forced to close after three arson fires. *Id.* Planned Parenthood of Connecticut experienced three bomb threats, forcing evacuation of its building during surgical procedures. *Hearings* (statement of Joan Babbott, Executive Director of Planned Parenthood of Connecticut). The offices of Hillcrest Clinic, a first-trimester outpatient

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a story entitled, "Abortion *Forced* on Invalid After Guardianship Granted to Mom." (Emphasis added.) The invalid in question was a 35-year-old victim of Huntington's chorea, weighing 75 pounds, who had been raped at a nursing home. ALL News, June 28, 1985, at 1. American Life Lobby takes the position that "[r]ape and incest are not legitimate exceptions and will be used as loopholes to justify public funding of many abortions." Letter dated April 16, 1984 concerning H.R. 1510, copies of which have been lodged with the Clerk of the Court.

[17] N.Y. Times, Aug. 11, 1985 (Magazine), at 18, 28.

[18] Copies of statements submitted in these hearings, which have not been concluded and are not published, are being lodged with the Clerk of the Court.

abortion facility in Norfolk, Virginia, were set on fire in 1983 and a bomb was exploded outside the building in 1984. *Hearings* (statement of Heather C. Green, Director of Community Education, Hillcrest Clinic).

Between January 1, 1981 and July 19, 1985, 416 acts of antiabortionist violence were reported to NAF, 135 of which took place between January 1, 1985 and July 19, 1985. Only nine such incidents were reported in 1981. These acts include bomb threats; clinic invasions; vandalism; death threats; assaults or batteries; burglaries; attempted arson or bombings; arsons; and bombings.[19] These figures do not include incidents of picketing and harassment or hate mail or harassing phone calls.[20]

The 1985 district court decision enjoining enforcement of two additional disclosure provisions of the 1982 Act found that:

> [P]ro-life protests have increased in frequency and intensity and at times have exploded into violent confrontations . . . . Several of plaintiffs' witnesses testified about takeovers of clinics by pro-life demonstrators which have resulted in arrests of up to thirty people at a time. Women entering and leaving clinics have been verbally harassed. . . . The pat-

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[19] Information concerning these reports is set forth in NAF's *Summary of Clinic Violence as Reported to the National Abortion Federation*, copies of which are being lodged with the Clerk of the Court.

[20] Even some moderate elements of the antiabortion movement have failed to condemn violence against abortion clinics. For example, John Willke, President of the National Right to Life Committee, suggests that the only way to stop the antiabortion violence is "to stop the violence inside the doors [of the abortion clinics] that is causing it." Willke, *Opposing Clinic Violence*, Nat. Right to Life News, Jan. 10, 1985, at 3. The Pro-Life Action League, one of the more militant antiabortion groups, refuses to condemn the destruction of abortion facilities "because we refuse to cast the abortionists in the role of victim when they are in fact victimizers. . . ." *Hearings* (statement of Joseph Scheidler, Director, Pro-Life Action League).

> tern of hostile behavior which has developed in the past two years has also included picketing and verbal harassment of clinic physicians and staff members by name both at their facilities and at their homes and attempts to block ingress and egress at facilities.

Slip op. at 25-26. Similarly, a recent Washington State Superior Court decision found that antiabortionist picketing of a Medical Building occupied by over two dozen medical offices had created a "clear and present danger" to patients and physicians.[21]

Proponents of "direct action" purport to justify these tactics by invoking the First Amendment and the "defense of necessity." Although these justifications are without basis and have been widely rejected, the persistence of their assertion confirms the growing scope and militancy of antiabortionist violence and harassment.[22]

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[21] Evidence was presented that one woman, who was miscarrying and bleeding heavily, was delayed in entering the building for emergency care. Another woman's already high blood pressure was exacerbated to dangerous levels because the picketers upset her. The court further found that ingress and egress of persons visiting or working at the Medical Building had been obstructed; that picketing had been disorderly, coercive and aggressive; and that " 'counseling' had been forced upon those attempting to enter or leave the building." *Bering v. SHARE*, Civ. No. 85200796, Findings of Fact and Conclusions of Law at 4, 5 (Wash. Super. Ct. Mar. 22, 1985), *appeal docketed*, No. 51533-6 (Wash. Mar. 28, 1985). Copies of this unreported decision are being lodged with the Clerk of the Court.

[22] The necessity cited by appellants [that their actions were necessary to save human life] cannot shield them from criminal liability for their acts. . . . The rights to free speech, to assembly and to petition the government for grievances are a cornerstone of the American system. So, too, is the right to be free from criminal interference. These appellants trespassed on the rights of others and did so without excuse.

Gaetano v. United States, 406 A.2d 1291, 1295 (D.C. 1979); *see also Hoffart v. Texas*, 686 S.W.2d 259 (Tex. Crim. App. 1985); *Sigma Reproductive Health Center v. Maryland*, 297 Md. 660, 467 A.2d 483 (Md. 1983); *St. Louis v. Klocker*, 637 S.W.2d 174 (Mo. App. 1982); *Cleveland v. Anchorage*, 631 P.2d 1073 (Alaska 1981); *People v. Stiso*, 93 Ill. App. 3d 101, 416 N.E.2d 1209 (Ill. App. Ct. 1981); *People v. Krizka*, 92 Ill. App. 3d 288, 416 N.E.2d 36 (Ill. App. Ct. 1980). *See* Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. Cinn. L. Rev. 501, 502-03 (1979).

A discussion of whether the First Amendment does or should protect conduct engaged in by antiabortion activists is beyond the scope of this brief. This Court has held that time, place and manner restrictions are reasonable if "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

[23] It is currently difficult to identify a physician from a license plate number without "hav[ing] a friend in the traffic division or in the Secretary of State's Office. Ordinarily, if you call up the license bureau with a license number and ask for the name and address of the owner, you will get a runaround and may have a hard time getting it." *99 Ways* at 221.

[24] *See* Defendants' Supplemental Memorandum of Law in Opposition to a Preliminary Injunction Against Enforcement of the Public Disclosure Provisions of Sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act at 7, filed in the subsequent district court proceeding in this case. *See also 99 Ways* at 325: "Finding out which hospitals perform abortions is more difficult than discovering the abortion clinics, because hospitals rarely advertise their abortion program."

2. *The Pennsylvania disclosure requirements facilitate identification of targets for antiabortionist violence and harassment*

Although antiabortionist literature contains advice about how to identify individual abortion patients, clinics, physicians and staff members, it recognizes the difficulty of obtaining desired information. Current techniques include photographing patients and recording license plate numbers of physicians, staff members and patients. Nevertheless, it can be difficult to identify the holder of a particular license plate [23] and some abortion facilities and physicians do not advertise their services.[24]

These obstacles to identification largely would be eliminated by the disclosure requirements of the 1982 Act.

The publicly available reports of individual abortions and complications required by § 3214(a) and (h) would provide a great deal of personal information about individual patients, excluding only their actual names and addresses. It would not be difficult to identify from a report required by § 3214(a), for example, a college-educated 28-year-old Asian woman with three living children in a small Pennsylvania town who underwent an abortion at a particular clinic on a particular date. In many cases, antiabortion activists would not have to depend upon surreptitious help from friends in motor vehicle bureaus to identify particular physicians, because the identity of every abortion facility, including private physicians' offices, would be publicly available. The names of physicians preparing reports of complications required by § 3214(h) would be evident on the reports themselves. A physician who both performs an abortion on a patient and who subsequently treats that patient for a complication thus would be identifiable from the face of the complications report.

Further, the number and type of abortions performed at each facility could readily be determined by an analysis of these reports.[25] Pennsylvania has admitted in the subsequent district court proceeding that "the disclosure provisions make available information which enables opponents of abortion to direct their protests against those facilities which perform many abortions or inordinate numbers of late-term abortions." [26]

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[25] The disclosure of this type of information in reports required by other public disclosure provisions of the 1982 Act has been preliminarily enjoined because "there is a reasonable probability that the disclosure requirements will result in increased threats, harassment, or reprisals and will therefore impose a legally significant burden on the constitutional right to choose to have an abortion." 1985 district court decision, *supra* p. 7, at 31.

[26] Defendants' Memorandum of Law in Opposition to a Preliminary Injunction Against Enforcement of the Public Disclosure Requirements of § 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act at 8 n.4 (hereinafter cited as "Defendants' Opposition Memorandum"), filed in the subsequent district court proceeding.

Post-abortion identification of patients can serve two objectives of those who wish to deter women from choosing abortion. First, the possibility of public identification could act as a general deterrent upon women who are considering abortion. "In Charleston, West Virginia, right-to-life protesters photograph patients as they enter the Women's Health Center, causing them to worry that their picture may appear in the local newspaper." *The Holy War* at 6. Second, antiabortion groups such as Women Exploited By Abortion (hereinafter "WEBA"), are interested in persuading women who have undergone abortions to become converts "committed to ministering to women who need to be set free from the bondage of abortions." [27] The intrusive nature of such recruiting efforts is apparent.

The 1982 Act's disclosure requirements will enable antiabortionists to identify more easily those seeking or providing abortion services. Armed with this information, the activists can more easily target facilities and individuals for harassment and attack. The methods currently employed by antiabortion activists are tailored to the information currently available.[28] The increased availability of confidential information will result in placing more obstacles in the paths of women who may choose abortion to terminate their pregnancies. The dangers of making such

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[27] *See* the WEBA Brochure, copies of which are being lodged with the Clerk of the Court.

> One way to make up for the loss of one's child is to help prevent another woman from destroying hers. * * * We must be bold in asking people with special knowledge and experience to use it in the abortion battle. It is sometimes difficult to talk them into exposing their dark secrets. . . .

99 Ways at 228-29.

[28] There is a lot of imagination and creativity still untapped in the pro-life ranks. There are effective means of carrying on the guerilla warfare necessary for victories in the battle against abortion. *There are many ideas not mentioned here because we haven't thought of them yet.*

99 Ways at 341 (emphasis added).

information available are, moreover, recognized by the practices of other states and professional organizations.[29]

B. The Pennsylvania Disclosure Requirements Interfere with the Availability of Safe Abortion Services

Access to abortion services in the United States currently is limited geographically.

> Seventy-eight percent of all U.S. counties—containing 28 percent of women aged 15-44—had no identified provider of abortion services in 1982. Only two percent of abortions were performed in nonmetropolitan counties in that year, although 26 percent of women of reproductive age live in such counties. Fully 87 percent of nonmetropolitan counties had no abortion providers at all in 1982.
>
> Despite the concentration of abortion services in urban areas, 47 percent of metropolitan counties also had no abortion service providers in 1982.

Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 Fam. Plan. Persp. 119 (May/June 1984). The disclosure requirements of the 1982 Act would further limit the availability of abortion services by exposing all abortion providers to harassment and violence.

Antiabortionist literature is replete not only with suggestions of how to apply pressure to physicians and abortion clinics, but also with success stories about providers who have been put out of business.[30] The disclosure re-

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[29] *See infra* pp. 27-30.

[30] *See, e.g., Pensacola Abortionist Quits; Faced Insurance Problems, Eviction*, ALL (American Life Lobby, Inc.) News, June 28, 1985, at 1 (doctor's office had been destroyed by a bomb); *Dallas Abortionist Quits After Picket of Residence; Activists Close Pa. Abortuary; Prevent Its Relocation*, ALL News, June 7, 1985, at 1; *Pa. Doctor Resigns from N.Y. Abortuary After Private Practice Is Picketed*, ALL News, May 3, 1985, at 3; *San Diego Abortuary Burned Again—$25,000 in Damages Sustained*, ALL News, Apr. 19, 1985, at 3; *Picketers Target Doctors' Offices; Two Doctors Stop Doing Abortions*, ALL News, Mar. 29, 1985, at 2; *Abortionist Quits Amid Protest*, The Life Advocate, July 1985, at 3; *see also 99*

quirements of the 1982 Act would enable antiabortion activists to target additional facilities and physicians, as well as specific facilities and physicians, for maximum impact. If the pressure tactics advocated by antiabortion groups are successful in closing down abortion facilities, women who choose abortion will be forced "to travel to find available facilities, resulting in both financial expense and additional health risks." *Akron*, 462 U.S. at 435. Thus, the disclosure requirements of the 1982 Act would unconstitutionally restrict the availability of abortion services.

The disclosure requirements of the 1982 Act also may enable antiabortionists to interfere with the provision of safe abortion services. Antiabortionists boast that their activities increase the incidence of complications resulting from abortions.

> [W]hen pro-life pickets are outside a clinic, complications and confusion inside the clinic increase by as much as 400 percent. * * * Consider that if our presence at clinics causes four times more confusion and complications than there would be if we were not there, then it is obvious that we should be there every time they operate. * * * The only way to avoid complications is to avoid abortions.

99 Ways at 74-76.

In *Bering v. SHARE*, the Washington State Superior Court found that "the picketing and 'counseling' . . . has caused Plaintiffs and patients or visitors to the Medical Building severe emotional distress, and has created a substantial risk of physical and mental harm to patients and visitors. . . ." Findings of Fact and Conclusions of Law at 4.

By enabling antiabortion activists to target additional facilities and doctors and to target specific facilities and

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Ways at 151-53 (Picket the Abortionists' Homes); 171-75 (Gather Evidence Against the Abortionists); 176-77 (File Suit Against the Abortionists); 197-99 (Use Pressure); 211-13 (Keep the Abortionists Out of Your Community).

doctors for maximum impact, the public disclosure requirements may jeopardize the health of women who choose abortion. The findings in the 1985 district court decision include the example of a young woman who had just undergone an abortion and whose car locked bumpers with another car as she was attempting to leave the parking lot. A crowd of antiabortion protesters taunted the woman and not only refused to help, but also commented, "It looks pretty bad, but it's not as bad as what you just did in there." The woman, who was crying and becoming increasingly upset, got out of her car and tried manually to disengage the bumpers, "threatening physical injury to herself." Slip op. at 8. The court's findings also discuss a patient under general anesthesia who awoke in the open air during winter weather because a bomb threat forced the clinic to evacuate. Slip op. at 13.

C. The Pennsylvania Disclosure Requirements Unconstitutionally Violate Patients' Privacy Rights and Impair the Abortion Decision

In *Planned Parenthood v. Danforth*, 428 U.S. at 81, this Court upheld recordkeeping requirements of the Missouri statute because they "properly respect[ed] a patient's confidentiality and privacy." Unlike the Pennsylvania statute, the Missouri statute in *Danforth* required that the records "shall be confidential and shall be used only for statistical purposes." *Id.* at 79. The records were permitted to be inspected only by government "public health officers" and were to be kept only "for seven years in the permanent files of the health facility where the abortion was performed." *Id.* These safeguards assisted in persuading this Court that the requirements were within constitutional limits. *Id.*[31]

Under Pennsylvania's 1982 Act, however, a woman choosing to terminate her pregnancy through abortion

[31] In *Planned Parenthood v. Ashcroft*, 462 U.S. at 489-90, this Court upheld a statutory provision requiring a pathology report for each abortion performed and noted that "Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here." *Id.* at 490 n.14.

must publicly disclose personal and medical details. The unconstitutional deterrent impact of such disclosure on "the woman's exercise of her right," *Akron*, 462 U.S. at 430, is apparent.[32] In addition, the 1982 Act unconstitutionally forces a woman to choose between two privacy rights, both of which are protected by the Fourteenth Amendment. These rights were identified in *Whalen v. Roe*, 429 U.S. 589 (1977): "One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions." *Id.* at 599-600. As applied in the abortion context, these privacy rights are the woman's right to maintain confidentiality about her abortion and her freedom to decide whether or not to terminate her pregnancy through abortion.

Whalen upheld New York's filing requirements for certain drug prescription records that aided in the enforcement of laws aimed at minimizing the misuse of dangerous drugs. 429 U.S. at 597-98. This Court relied heavily on the fact that "[p]ublic disclosure of the identity of patients [was] expressly prohibited by the statute and by a Department of Health regulation," and the fact that elaborate security measures prevented disclosure to anyone except a small number of Department of Health employees and investigators. *Id.* at 594-95.

Disclosure of records about individual abortions and complications as required by the 1982 Act would impair both of the privacy interests identified in *Whalen*, without the safeguards of the New York statute. "[T]he right to collect and use [personal] data for public pur-

[32] *See Slevin v. New York*, 551 F. Supp. 917, 934-35 (S.D.N.Y. 1982):

> The degree of intrusion stemming from public exposure of the details of a person's life is exponentially greater than disclosure to government officials. . . . The mere fact that private information is available on demand to individuals who know what is sensitive and how to exploit it adds greatly to the inhibition, anxiety and embarrassment that the same disclosure might cause if restricted to the government.

poses is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Whalen*, 429 U.S. at 605; *see infra* p. 27. In contrast, Pennsylvania's 1982 Act expressly mandates disclosure of sensitive patient information to any interested member of the public. The Pennsylvania disclosure provisions unconstitutionally infringe on both privacy rights guaranteed by the Fourteenth Amendment, by forcing a woman to reveal confidential information about her abortion and by depriving her of her independence in the abortion decision.[33]

The mere nondisclosure of the woman's name in the Pennsylvania reports does not protect her privacy. Courts have recognized in other areas of the law that individuals can be identified without being named. In libel cases, for example, a plaintiff need not be named for a statement to be held libelous, so long as "the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant." *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966).[34] This Court recently recognized that a person's identity could be discovered by piecing together bits of superficially innocuous data. *Central Intelligence Agency v. Sims*, 105 S. Ct. 1881, 1892-93 (1985), upheld the power of the director of the Central Intelligence Agency to withhold institutional affiliations of "intelligence sources" because "'[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may place the questioned item of information in its proper context.'" (Citations omitted.)

The disclosure provisions may also inhibit the candor essential to a meaningful doctor-patient relationship. This Court has established that the "physician, in consultation with his patient, [must be] free to determine, without regulation by the state, that, *in his medical judgment*, the patient's [first-trimester] pregnancy should be terminated." *Roe v. Wade*, 410 U.S. at 163 (emphasis added). "The medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). If a woman fails to provide a complete and accurate medical record to the doctor because she fears public disclosure, the meaningful exercise of her doctor's medical judgment would inevitably be impaired.[35]

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[33] Another district court has applied the *Whalen* analysis to analogous disclosure requirements:

> This possibility of disclosure is far from innocuous and could damage the woman's right to privacy in at least two ways. First, highly personal information about the woman may be publicly revealed. To the extent that abortions past midterm are stigmatizing, disclosure could damage a woman's reputation. Second, the chance of disclosure could indirectly affect a woman's independence in deciding whether to have the abortion. A woman might choose not to have an otherwise necessary abortion if she knew that her decision could become virtually a matter of public record.

Wynn v. Scott, 449 F. Supp. 1302, 1328 (N.D. Ill. 1978); *see also Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973) ("[the disclosure section] is invalid because it subjects the abortion decision to public scrutiny by making the details of every abortion a matter of public record and thus chills exercise of the right of privacy in the abortion decision").

[34] *Accord Avins v. White*, 627 F.2d 637, 643 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Dion v. Kiev*, 566 F. Supp. 1387, 1389 (E.D. Pa. 1983); *Miller v. Lear Siegler, Inc.*, 525 F. Supp. 46, 57-58 (D. Kan. 1981). *See generally Restatement (Second) of Torts* § 564 comment b (1977) ("It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended.").

[35] Instead of giving [the doctor] an accurate medical history, she might well hide previous abortions, past incidents of venereal disease, or other data about her sexual activity that might be embarrassing but extremely relevant to a doctor's treatment

Until the end of the first trimester, "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.'" *Akron*, 462 U.S. at 429-30 (quoting *Roe v. Wade*, 410 U.S. at 163).[36] The court below found that the increased cost of recordkeeping resulting from these requirements would have a significant impact on the abortion decision. 737 F.2d at 302.[37] In addition, as demonstrated above, Pennsylvania's disclosure requirements further interfere significantly with the abortion decision and the physician-patient relationship by invading privacy rights guaranteed by the Fourteenth Amendment and by subjecting abortion providers and their patients to increased harassment. This Court has held that public disclosure of information could not constitutionally be required where there was a "reasonable probability" that disclosure would subject the persons identified to "threats, harassment or reprisals." *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 100-02 (1982).[38]

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and advice. This is a clear constraint on the development of a candid doctor-patient relationship.

Margaret S. v. Edwards, 488 F. Supp. 181, 214 (E.D. La. 1980).

[36] In *Harris v. McRae*, 448 U.S. 297, 315 (1980), this Court upheld the Hyde Amendment, which generally precludes the use of federal funds to reimburse the costs of abortions under Medicaid, because it placed no governmental obstacle in the path of a woman to choose abortion. *See also Maher v. Roe*, 432 U.S. 464, 475-76 (1977) (distinguishing *direct state interference* with a protected activity from *state encouragement* of an alternative activity).

[37] The court referred to this Court's warning in *Danforth* that "recordkeeping and record-maintaining provisions must not be 'utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have said today to be an otherwise unconstitutional restriction.'" 737 F.2d at 302 (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 81).

[38] In *Brown*, this Court concluded that, "In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id.* at 102. *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S.

II. THE PENNSYLVANIA DISCLOSURE REQUIREMENTS ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST AND ARE INCONSISTENT WITH ACCEPTED PRACTICES IN THE COMPILATION OF HEALTH STATISTICS

A. Pennsylvania Has Not Demonstrated Any Compelling Interests

"Where certain 'fundamental rights' are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. at 155. Pennsylvania has not met, nor can it meet, this burden.

Pennsylvania's brief in this Court has not identified any compelling interests to justify the extraordinary disclosure requirements of the 1982 Act.[39] In the district court proceedings subsequent to the court of appeals decision, Pennsylvania identified four interests allegedly supporting disclosure of abortion information:

> ensuring that shoddy practitioners do not hide behind the corporate veil, aiding citizens in the exercise of their first amendment rights to oppose abortion, providing a pool of statistical and medical knowledge, and protecting the public's freedom to

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449, 462, 466 (1958) ("immunity from state scrutiny of [NAACP] membership lists" was "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment," in light of the showing that disclosure of the identity of the NAACP's members had "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.")

[39] Appellants' discussion of the disclosure requirements is limited to a footnote: "Of course, our argument that the reporting requirements are valid subsumes the related contention that the information gathered from these reports must be made available if it is to be useful." Brief for Appellants at 63 n.21. Appellants have not, however, offered any explanation why detailed personal and other abortion information must be made public to be useful.

choose medical providers in accordance with their beliefs.

1985 district court decision, slip op. at 20.

This Court, however, has recognized only two compelling state interests that justify regulation of abortion: protection of maternal health and protection of the potential life of the fetus. *Roe v. Wade*, 410 U.S. at 159. The state's interest in the health of the mother arises after the end of the first trimester and "from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* at 163; *see also Akron*, 462 U.S. at 430. The state's interest in potential life arises at viability, when "the fetus . . . presumably has the capability of meaningful life outside the mother's womb." 410 U.S. at 163. The state may regulate to protect fetal life after viability, except that the state may not proscribe abortion when it is necessary to preserve the life or health of the mother. *Id.* at 163-64.

Pennsylvania's interests in exposing shoddy practitioners and collecting statistical information, while peripherally related to protection of maternal health and potential life, do not rise to the level of compelling state interests. *See, e.g.*, 1985 district court decision, slip op. at 42. Moreover, it is difficult to discern why detailed information about specific abortion providers and their patients need ever be disclosed to the public to serve these interests. Information about complications can more than adequately be monitored by designated health officials, as is done in other states.

To the extent that the Pennsylvania disclosure provisions are designed to advance the agenda of antiabortionists, they do not serve "compelling state interests." [40]

[40] Appellants argued in the subsequent district court proceeding that if the state "may influence women throughout their pregnancies to forego abortions in favor of childbirth, [it may] . . . take the substantially less intrusive step of providing its citizens with the information essential for them to exercise freedom of association." Defendants' Opposition Memorandum at 12. *See also* the discussion of the legislative history, *supra* p. 6.

Insofar as Pennsylvania relies on the interests of third parties in opposing abortion and boycotting providers of abortion services, it seeks to accomplish indirectly that which it cannot do directly: interfere with the woman's abortion decision. *Danforth* held that the state may not delegate to a spouse the power to veto an abortion which the state itself is prohibited from exercising. 428 U.S. at 69. Pennsylvania's disclosure provisions similarly delegate to antiabortionists the power to interfere with the woman's right to choose abortion. *Akron* held that a state may not adopt regulations designed to influence a woman's informed choice between abortion and childbirth. 462 U.S. at 444. By adopting regulations designed to permit third parties to influence a woman's informed choice, Pennsylvania violates both the letter and spirit of this Court's decisions concerning the right to choose abortion.

B. The Pennsylvania Disclosure Requirements Are Inconsistent with the Practices of Other States, the Federal Government and Professional Organizations that Compile Health Statistics

While 26 other states statutorily require reports about abortions, no other state requires public disclosure of such reports. Moreover, 23 of those states explicitly mandate that these reports be treated confidentially.[41] The 1982 Act also is inconsistent with procedures of the Centers for Disease Control of the United States Department of Health and Human Services ("CDC") and professional organizations such as the Alan Guttmacher Institute and NAF. The procedures of these organizations for collecting and reporting abortion information reflect the accepted practice of disclosing only aggregate data concerning abortions and abortion practices while maintain-

[41] *See* App. C and D. of the Brief *Amici Curiae* of the American Civil Liberties Union, *et al.*

ing confidentiality about specific abortion providers and their patients.

The objectives of the CDC's surveillance are to document the number and characteristics of women obtaining abortions and to eliminate preventable mortality and morbidity related to abortion. Centers for Disease Control, U.S. Dep't. Health & Human Serv., *Abortion Surveillance 1979-1980* at Preface (1983). The CDC achieves these objectives without sacrificing the confidentiality of information about abortion providers and their patients. The CDC collects abortion statistics by state of occurrence from health departments, hospitals and/or other medical facilities and the National Center for Health Statistics and publishes the collected statistical information only *in the aggregate*.[42]

The Alan Guttmacher Institute, a private institution for research, policy analysis and public education, also protects from disclosure information about specific abortion facilities in its reporting of statistical data about abortions. The Guttmacher Institute published a survey in 1983 that analyzed information collected about abortions in the United States in 1979 and 1980 and presented data in *aggregate* form only. Even the number of facilities in certain locations was suppressed. The results of the Guttmacher Institute's eighth abortion survey covering the years 1981 and 1982 again were reported in *aggregate* form only in *Abortion Services in the United States, 1981 and 1982, supra* p. 18, at 119.

[42] The Brief *Amici Curiae* of Watson D. Bowes, Jr., M.D. and Richard T.S. Schmidt, M.D. in Support of Appellants ("Bowes-Schmidt Brief") relies on information collected by the CDC for the argument that the reporting requirements of § 3214 merely "set[] forth standard bookkeeping requirements" in the area of vital statistics. Bowes-Schmidt Brief at 3. Appellants also attempt to analogize the 1982 Act's disclosure requirements to the CDC's collection of data. Brief for Appellants at 61. In addition to some significant differences between the data collected by the CDC and Pennsylvania, these arguments fail to point out that the CDC does not make public the information it collects from specific facilities and physicians.

In the course of its data collection efforts in 1981, the Guttmacher Institute was unable to collect abortion information from the state health departments in six relatively large states. Although these states previously had shared abortion information with the Institute, "due to local harassment by abortion opponents, many health departments have instituted a policy of confidentiality in order to encourage provider cooperation with data collection efforts." Alan Guttmacher Institute, *Abortion Services in the United States, Each State & Metropolitan Area, 1979-1980* at 99 (1983).

NAF also collects and reports aggregate health-related data about abortions performed by its membership.[43] Like the Guttmacher Institute, NAF treats with confidentiality the data it receives about individual institutions. Further, NAF does not collect or report any information that would identify or facilitate the identification of patients.

> The maintenance of complete and accurate records is important for quality patient care and meaningful review of services. Reporting of legally induced abortions to public agencies where required and to non-public agencies is essential for providing and improving maternal health and family planning services. *Confidentiality of individual patient identity is essential and must be safeguarded in abortion reporting.*

Reporting Standards, NAF *Standards for Quality Care* at 21 (emphasis added).

[43] NAF requires that its members provide on a quarterly basis the following health-related data: number of abortions performed; length of gestation; percentage of patient follow-up contact within six weeks of the abortion; number of deaths; number of patients receiving one or more blood transfusions; occurrence of perforations; occurrence of pelvic infection requiring hospitalization for at least 72 hours within two weeks of the abortion; and the number of repeat abortion procedures because of retention of tissue within one month of the original procedure. Copies of NAF's reporting forms entitled "Quarterly Abortion Report" and "Individual Complication Report" are being lodged with the Clerk of the Court.

The public disclosure of individualized reports about specific abortion providers and patients required by the 1982 Act differs sharply from the accepted practice of guarding the confidentiality of medical records in general.[44] Although Pennsylvania no longer treats information and documents about abortions with the "confidentiality customarily accorded to medical records," as it did under § 6606(d) of the 1974 Abortion Control Act, Pennsylvania still requires that the Department of Public Welfare maintain the confidentiality of medical records of persons applying for medical assistance benefits. 62 Pa. Cons. Stat. Ann. § 1404(c) (Purdon Supp. 1985). As Pennsylvania recognizes the privacy interests of persons seeking medical assistance benefits, it is difficult to discern any legitimate rationale for the 1982 Act's public disclosure requirements of medical records relating to abortions.

The public disclosure requirements of the 1982 Act are not "reasonably directed to the preservation of maternal health" nor do they "properly respect a patient's confidentiality and privacy." *Danforth*, 428 U.S. at 81. Accordingly, these sections of the 1982 Act must be struck down as unconstitutional.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision below of the United States Court of Appeals for the Third Circuit.

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[44] Information disclosed to a physician in the physician-patient relationship is treated confidentially. *See, e.g.*, Principle 5.05 of the Principles of Medical Ethics, *Current Opinions of the Judicial Council of the American Medical Association* (1984); American Medical Association ("AMA"), *Model State Legislation on Confidentiality of Health Care Information* (1981); American Medical Record Association ("AMRA"), *Confidentiality of Patient Health Information* (1981); and AMRA, *Confidentiality and Security of Secondary Health Records* (1984). In § 3(c) of its model state legislation, the AMA defined "confidential health care information" as "information relating to a person's health care history, diagnosis, condition, treatment or evaluation."

Respectfully submitted,

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Dated: August 30, 1985

COMMONWEALTH OF PENNSYLVANIA
Department of Health

File No.

REPORT OF INDUCED TERMINATION OF PREGNANCY

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH. THE SECOND COPY OF THE FORM WILL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING.

FACILITY NAME
FACILITY CODE
COUNTY OF PREGNANCY TERMINATION
CO. CODE
DATE OF PREGNANCY TERMINATION (M D Y)

PATIENT IDENTIFICATION
AGE
RACE (1 WHITE 2 BLACK 3 INDIAN 8 OTHER 9 UNKNOWN)
HISPANIC ORIGIN (1 YES 2 NO)
METHOD OF PAYMENT (1 SELF PAY 2 MEDICAL ASSISTANCE 3 INSURANCE 4 UNKNOWN)

MARRIED (1 YES 2 NO)
EDUCATION (SPECIFY ONLY HIGHEST GRADE COMPLETED)
ELEMENTARY OR SECONDARY (0-12)
COLLEGE (1-4 OR 5+)

PREVIOUS PREGNANCIES (COMPLETE EACH SECTION)
LIVE BIRTH
NOW LIVING — NUMBER ____ (10 NONE)
NOW DEAD — NUMBER ____ (10 NONE)
OTHER TERMINATIONS
SPONTANEOUS — NUMBER ____ (10 NONE)
INDUCED — NUMBER ____ (10 NONE)

DATE LAST MENSES BEGAN (M D Y)
PHYSICIAN'S ESTIMATE OF GESTATION (COMPLETED WEEKS)

WHERE DOES PATIENT ACTUALLY LIVE?
A STATE _____ B COUNTY _____
DOES PATIENT LIVE IN A TOWNSHIP? YES, PATIENT LIVES IN _____ TOWNSHIP
NO, PATIENT LIVES WITHIN LIMITS OF _____ CITY/BORO

DATE OF PREVIOUS TERMINATION (IF KNOWN)
DATE OF MEDICAL CONSULTATION (M D Y)
DID A MEDICAL EMERGENCY EXIST? (IF YES, EXPLAIN BASIS FOR JUDGMENT.) (1 YES 2 NO)
WAS THE FETUS VIABLE PRIOR TO PROCEDURE? (EXPLAIN BASIS FOR DETERMINATION.) (1 YES 2 NO)
IF VIABLE, EXPLAIN REASON FOR SELECTED TERMINATION PROCEDURE

CONCURRENT CONDITIONS INDICATING
0 NONE
1 HYDATIDIFORM MOLE
2 GENITAL ANOMALY
3 RH HP
4 MALIGNANCY
5 RADIATION
6 ANOXIA
7 GENETIC
8 MATERNAL DISEASE
9 OTHER (SPECIFY)
0 NOT TO BE USED
1 CARDIAC
2 RENAL
3 HEPATIC (MEDICAL)
4 HEMATOLOGIC
5 NAP
6 INFECTIOUS
7 OTHER (SPECIFY)

COMPLICATIONS (OBSTETRICAL) RESULTING FROM PROCEDURES
0 NONE
1 COAGULOPATHY
2 HEMORRHAGE
3 OTHER HEMORRHAGE
4 INFECTION
5 UTERINE PERFORATION
6 CERVICAL LACERATION
7 RETAINED PRODUCTS
8 EMBOLISM
9 ANESTHESIA
10 PSYCHOLOGICAL
11 FAILURE TO ABORT
12 DEATH
13 OTHER (SPECIFY)

TERMINATION PROCEDURES
0 SUCTION CURETTAGE (INCLUDES D & E)
1 SHARP D & C (EXCLUDES D & E)
2 DILATION AND EVACUATION
3 INTRA UTERINE SALINE INSTILLATION
4 INTRA UTERINE PROSTAGLANDIN INSTILLATION
5 WITH OXYTOCIN
6 WITH LAMINARIA
7 HYSTERECTOMY
8 HYSTERECTOMY
9 OTHER (SPECIFY)
PRIMARY
ADDITIONAL

BIRTHWEIGHT OF EARLIEST FETUS (GRAMS)
WERE EXPELLED PRODUCTS EXAMINED BY PATHOLOGIST OR OTHER QUALIFIED PERSON? (1 YES 2 NO)

REFERRING PHYSICIAN
NAME _____
LICENSE NUMBER

ATTENDING PHYSICIAN
NAME _____
LICENSE NUMBER

SIGNATURE AND DATE SUBMITTED (M D Y)

*TOTAL DEATHS (FOETUS & INFANT) OR LIVE BIRTHS MUST ALSO BE REPORTED ON A CERTIFICATE OF FETAL DEATH AS REQUIRED BY THE VITAL STATISTICS ACT OF 1953

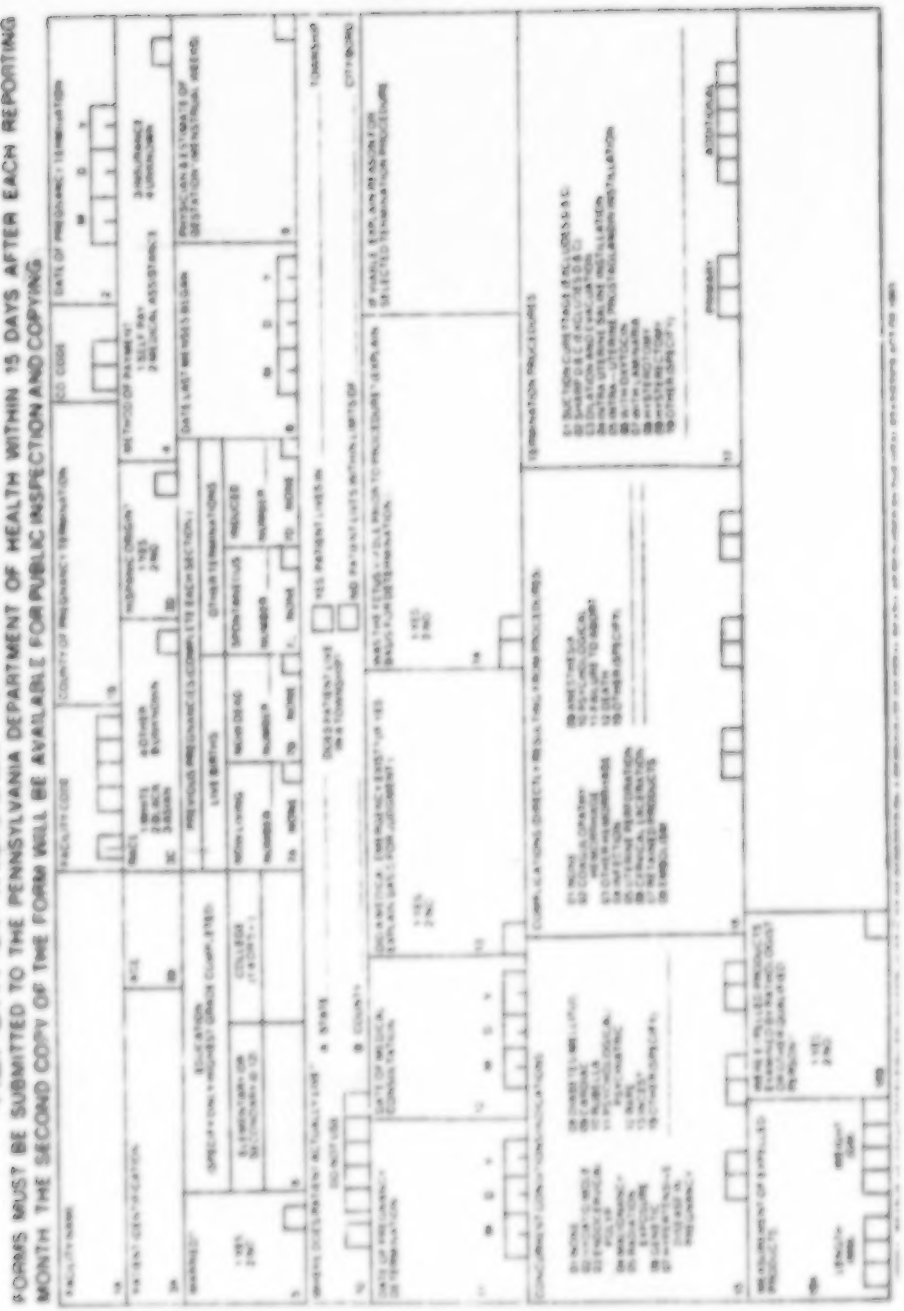
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File No.

COMMONWEALTH OF PENNSYLVANIA
Department of Health

REPORT OF INDUCED TERMINATION OF PREGNANCY

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH. THE SECOND COPY OF THE FORM WILL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING



3a

PAGE 1 OF 2

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

ABORTIONS: REPORT OF COMPLICATIONS

Effective December 8, 1982, every physician who provides medical care or treatment to a woman because of complications resulting from an abortion or attempted abortion must file a report with the Bureau of Quality Assurance, Pennsylvania Department of Health, P.O. Box 90, Harrisburg, Pennsylvania 17108. Reports are due within 20 days of the date physician first examines the woman.

1. Age of patient: ☐

2. Previous pregnancies:

Live Births		Other Terminations	
☐ Now Living	☐ Now Dead	☐ Spontaneous	☐ Induced

a. If previous induced termination(s), type of procedure (check all that apply):

Suction curettage (exclude D&E)	☐	With oxytocin	☐
Sharp curettage (exclude D&E)	☐	With laminaria	☐
Dilation and Evacuation	☐	Hysterotomy	☐
Intra-uterine Saline Instillation	☐	Hysterectomy	☐
Intrauterine Prostaglandin Instillation	☐	Other (specify)	☐

3. Facility where abortion was performed:

NAME

STREET

POST OFFICE | STATE | ZIP CODE

4. Date of abortion: ☐☐ MO ☐☐ DAY ☐☐ YR

5. Estimated menstrual weeks of gestation: ☐

4a

(4230-859 (11/82)) ABORTIONS: REPORT OF COMPLICATIONS PAGE 2 OF [illegible]

6. Type of termination procedure (check all that apply)

Suction curettage (excludes D&E)	☐	With oxytocin	☐
Sharp curettage (excludes D&E)	☐	With ergonovine	☐
Dilation and Evacuation	☐	Hysterotomy	☐
Intra-uterine Saline Instillation	☐	Hysterectomy	☐
Intra-uterine Prostaglandin Instillation	☐	Other (specify)	☐

7. Nature of complication or complications

8. Medical treatment given

9. Nature and extent of any permanent condition caused by the complication

10. Date of first examination of patient: [ ][ ][ ]

Physician's Signature | License No. | Date Submitted

[Pa.B. Doc. No. 82-1767. Filed December 3, 1982. 9:00 a.m.]

Nos. 84-495, 84-1379

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, et al.,
Appellants,

—vs.—

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, et al.,
Appellees.

EUGENE F. DIAMOND, et al.,
Appellants,

—vs.—

ALLAN G. CHARLES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITARIAN UNIVERSALIST ASSOCIATION, AND TWENTY-TWO OTHER RELIGIOUS ORGANIZATIONS, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

This brief amici curiae is filed in support of appellees in both cases before the Court, by the following religious organizations: THE AMERICAN ETHICAL UNION; AMERICANS FOR RELIGIOUS LIBERTY; AMERICAN HUMANIST ASSOCIATION; BOARD FOR HOMELAND MINISTRIES, UNITED CHURCH OF CHRIST; B'NAI BRITH WOMEN; CATHOLIC WOMEN FOR REPRODUCTIVE RIGHTS; CATHOLICS FOR A FREE CHOICE; COORDINATING CENTER FOR WOMEN, UNITED CHURCH OF CHRIST; EPISCOPAL WOMEN'S CAUCUS; NATIONAL BOARD, YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A.; NATIONAL COALITION OF AMERICAN NUNS; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL FEDERATION OF TEMPLE SISTERHOODS; NATIONAL SERVICE CONFERENCE, AMERICAN ETHICAL UNION; OFFICE FOR CHURCH IN SOCIETY, UNITED CHURCH OF CHRIST; PIONEER WOMEN/NA'AMAT; PRESBYTERIAN CHURCH (U.S.A.); UNION OF AMERICAN HEBREW CONGREGATIONS; UNITARIAN

UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALIST WOMEN'S FEDERATION; UNITED CHURCH OF CHRIST; UNITED SYNAGOGUE OF AMERICA; WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM.

The organizations joining this brief are or include representatives of Protestant, Catholic, Jewish and other faiths, reflecting a broad spectrum of religious believers in this country. These organizations are committed to principles of religious liberty; they also reflect a broad spectrum of beliefs about the morality of abortion.[1] Among the amici are denominations which adhere to

1. The positions of the Religious Coalition for Abortion Rights, of Americans for Religious Liberty, and of 36 national religious organizations which favor the right to choose abortion among which are the amici curiae, are contained in the Appendices A, B and C respectively at A-1, A-3, and A-4.

religious principles that permit, counsel, and even mandate abortion under certain circumstances. Others strongly discourage it under many circumstances. But all believe that the abortion decision is a deeply religious and personal one of ultimate dimension which must be relegated to the conscience of the individual woman free of governmental interference or coercion. They believe further that the effort to restrict abortion is generally rooted in an opposing theological position concerning the creation of human life and the beginning of human personhood; and that, in the face of religiously-based moral differences, government in a free society is without power to take sides.

It is the position of amici that the freedom of belief guaranteed by the First Amendment and principles of religious liberty require invalidation of this legislation

which has no purpose and effect other than to encroach upon and ultimately deny the right that is the cornerstone of our Constitution--the right of conscience.

With the consent of the parties indicated in letters being lodged with the Clerk, amici respectfully submit this brief to advance their position to this Court.

QUESTIONS PRESENTED

1. Whether First Amendment principles of freedom of conscience and religious liberty require adherence to Roe v. Wade and the invalidation of abortion restrictions designed to sponsor and impose a particular belief regarding the morality of abortion.

2. Whether the standard of strict scrutiny applied in Roe v. Wade and Akron v. Akron Center for Reproductive Health must be applied here to fulfill this Court's duty under Article III and the Bill of Rights to guard fundamental rights against legislative infringement.

SUMMARY OF ARGUMENT

Since Roe v. Wade, the nature and scope of individual constitutional rights at stake in the abortion context have never been questioned more explicitly or pointedly than in these cases.

The United States Department of Justice has submitted an amicus brief in which it urges the Court to repudiate the Roe v. Wade decision. The Solicitor General asserts that the Court should retract its acknowledgement, in Roe v. Wade, of the constitutional status of individual freedoms implicated in the abortion decision, or at least dilute its standard of review and defer to the legislature with respect to a fundamental right in controversy. This contention advocates a shocking and dangerous departure from the principle which is the cornerstone of our constitutional scheme, that it is the "province and duty of the judicial department

to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch), 137, 176 (1803), and to protect the rights of the individual against majoritarian disapproval and excess.

In defense of the challenged statutes, the Solicitor General contests the constitutional command at the heart of Roe v. Wade--that civil government must remain ideologically neutral with respect to the inseparable questions of the "morality" of abortion and "when life begins." The Solicitor General's argument highlights, just as the particular statutes before the Court illustrate, the impermissibility of abortion restrictions under the First Amendment. It also underscores that the decision in Roe v. Wade, which denied to civil authority the power to adopt a "theory of life," was compelled not only by the Fourteenth but also by the First Amendment.

The First Amendment's shelter for the

realm of intellect and spirit denies to the state the power to require individuals to espouse or to listen to beliefs they do not hold. The First Amendment likewise protects against being induced or forced to act according to morally offensive beliefs. By requiring espousal of, and seeking to induce conformity to, the belief that human life begins at conception, the statutes violate the First Amendment.

Moreover, because the controversy over abortion involves competing moral viewpoints rooted, for the most part, in theological differences, statutes, such as those at issue here, which fall outside the ambit of neutral, judgment-free abortion regulations delineated in Roe v. Wade, violate the First Amendment guarantee of religious liberty.

These statutes interfere ideologically and practically with a woman's right to freely exercise her religion and conscience

in making the abortion decision, while placing no similar obstacles in the path of the woman whose faith compels childbirth. Views regarding the "morality" of abortion and the correlative question of whether human life begins at conception stem from deeply-held conscientious principles which intrinsically are, or represent the functional equivalent of, theological beliefs. State-sponsorship of any one viewpoint departs from the rigorous governmental neutrality required where competing religious and conscientious claims are at stake.

ARGUMENT

I. ADHERENCE TO ROE V. WADE IS NECESSARY TO PRESERVE FIRST AMENDMENT PRINCIPLES OF FREEDOM OF CONSCIENCE AND RELIGIOUS LIBERTY.

At the heart of the statutes at issue are several provisions which evidence an underlying purpose to advance the theory that actual life begins at conception, or at some point prior to birth. These provisions underscore the unconstitutionality of the remaining sections invalidated by the courts below, which advance this theory by impermissibly placing a higher value on the fetus than on the needs of the pregnant woman. They also bring into sharp focus the First Amendment underpinnings of this Court's refusal to allow civil government to adopt "a theory of life" to override a woman's right to abortion. Akron v. Akron Center for Reproductive Rights, 462 U.S. 416, 444 (1983); Roe v. Wade, 410 U.S. 113, 162 (1973).

The premises and purposes of the 1982 Pennsylvania Abortion Control Act (18 Pa. Cons. Stat. Ann. §§3201-3220) (Purdon 1983) are set forth in unequivocal terms at the outset. It is based on a legislative intent to "to protect the life and health of the child subject to abortion," and the conclusion that because "the Commonwealth places a supreme value upon protecting human life," it is necessary to impose upon physicians "precise standards of care where their actions do or may result in the death of an unborn child" (emphases added). §3202.

The Pennsylvania Act requires the doctor to tell a woman seeking abortion "that there may be detrimental physical and psychological effects [of abortion] which are not accurately foreseeable," §3205(a)(1)(iii) and the gestational age of the "unborn child" at the time the abortion is to be performed. §3205(a)(1)(iv). The doctor is required to

advise her of the possible availability of medical assistance benefits for "prenatal care, childbirth and neonatal care," §3205(a)(2)(i), and "[t]he fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion." §3205(a)(2)(ii). The doctor must also refer the woman to certain materials published by the state which contain, among other things, information regarding agencies and services available to assist her with pregnancy, childbirth and adoption, a statement that "[t]he Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion," and information regarding "the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full-term, including any relevant information on the

possibility of the unborn child's survival." §3205(a)(2)(iii), §3208.

Finally, the Pennsylvania Act requires the doctor, in performing post-viability abortions, to utilize the method of abortion most likely to result in a live birth unless the procedure would create a "significantly greater medical risk" to the woman. §3210(b). As the Third Circuit found, this section requires "the woman to bear an increased medical risk in order to save her viable fetus...," and requires the doctor "to make a 'trade-off' between the woman's health and fetal survival." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 300 (3rd Cir. 1984). At the same time, the statute eliminates certain mental health concerns from the consideration of whether a woman's health is jeopardized by choosing a method of

abortion designed to save the fetus.[2]

The Illinois Abortion Law similarly contains provisions which reflect the state's purpose of advancing the theory that life begins at conception. For example, section 11(d) requires doctors under all circumstances to inform women of the fact that a prescribed drug, such as a form of birth control, acts as an "abortifacient," which is defined in section 2(10) as any substance or device known to cause "fetal death." Ill. Rev. Stat. Ch. 38, ¶¶81-22(10), 81-31(d)(1983). In carrying out the state's theory of the primacy of prenatal life over women's well-being, another provision requires doctors to observe the same standard of care in aborting a "possibly viable" fetus as would be required when attempting to bring

2. Section 3210(b) provides, in part, that "[t]he potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother."

a truly viable fetus to live births §6(4). Ill. Rev. Stat. Ch. 38, ¶81-26(4) (1983).

The portions of the Pennsylvania and Illinois statutes which propagandize the belief in the primacy of the fetus and the immorality of abortion, and which require individuals to express, listen to and act in accordance with that view, illuminate the meaning and wisdom of the decision in Roe v. Wade, 410 U.S. 113 (1973).

A. The Framework Established in Roe v. Wade Enforces The First Amendment Prohibition of State Sponsorship of Belief in Derogation of Individual Freedom of Conscience.

In Roe v. Wade, this Court emphasized the theological and metaphysical nature of the underlying question of when life begins:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in

a position to speculate as to the answer.

410 U.S. at 159. The absolute refusal to allow the state to "adopt a theory of life" to override a woman's right to abortion, or to regard its interest in potential life as overriding its interest in the well-being of pregnant women, was an affirmation of the individual's freedom to believe and to follow one's beliefs as well as of the absence of power in the state to sponsor a contrary civil or religious faith.

The Court in Roe v. Wade outlined the full extent to which legitimate state concerns justify government regulation of abortion. That decision correctly isolated the only neutral, judgment-free bases of regulation. It recognized that, under our secular system of government, the state's obligation to respect and preserve the life and health of women will, under all

circumstances, outweigh any interest the state has in the potentiality of life presented by the fetus. The Court precluded the state from altering this constitutionally-based hierarchy of governmental priorities. Conversely, it required civil government to follow a hands-off approach with respect to the value-laden issues of the morality of abortion and the question of "when life begins," and relegated such issues to the conscience of the individual.

The question of whether abortion is right or wrong for a particular woman under particular circumstances is a matter which involves competing claims based on divergent moral beliefs as to which the First Amendment's guarantee of freedom of conscience prohibits the state from taking sides. Virulent public debate over the correct set of absolute principles defining

the value to be ascribed to prenatal life and the circumstances under which abortion is right or wrong does not in any way suggest that the individual's conscientious decision deserves a lesser degree of constitutional protection. To the contrary, the controversy confirms the value and propriety of affording that very form of protection. As the Court recognized in West Virginia State Board of Education v. Barnette:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time have been waged by many good as well as evil men...Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of the opinion achieves only the unanimity of the graveyard.
>
> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there

> is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

319 U.S. 624, 641-42 (1943), quoted in Wallace v. Jaffree, __ U.S. __, 86 L.Ed. 2d 29, 41 n.39 (1985).

As the statutes before the Court in these cases demonstrate, the effort to control abortion is part of a new "struggle to coerce uniformity" and dictate the bounds of permissible thought, belief, expression and action. Both the Pennsylvania and Illinois statutes contain provisions purporting to insure "informed consent," yet which require the doctor to give, and the woman to hear, particular information which supports, in blatant and subtle ways, the underlying legislative contention that abortion is immoral.

While a doctor cannot complain of being required to give the objective information necessary to ensure informed consent, Akron v. Akron Center for Reproductive Health, 462 U.S. at 442-444, Planned Parenthood v. Danforth, 428 U.S. 52, 68 (1976), this ordinance converts the legitimate process of informed consent into both a "straight-jacket"[3] and a propaganda tool for the position that abortion is immoral. As such, it violates not only the right to decide free of state interference, but also the First Amendment right not to be coerced to speak or listen.

It is axiomatic that the state cannot, consistent with the First Amendment, use its citizens to propagandize certain beliefs. As the Court recently noted, "the right to speak and the right to refrain from speaking are

3. Planned Parenthood v. Danforth, 428 U.S. at 68 n. 8.

complementary components of a broader concept of freedom of mind...." Wallace v. Jaffree, 86 L.Ed. 2d at 40. Similarly, in Wooley v. Maynard, the Court held that freedom of thought protects the right of individuals not to bear an ideological message which they find "morally objectionable." 430 U.S. 705, 715 (1977). See also, Elrod v. Burns, 427 U.S. 347 (1976) (Public employment cannot generally be conditioned on affiliation with a particular political party). This form of governmental compulsion "transcends constitutional limitations on [government's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." West Virginia State Board of Education v. Barnette, 319 U.S. at 642.

Moreover, certain sections require the doctor to communicate or refer the patient to

information he or she does not believe to be truthful, let alone objective in nature. While there is no case on point in the annals of this Court, the freedom of thought and expression shielded by the First Amendment must surely extend protection against state-enforced compulsion to lie or mislead. See Torasco v. Watkins, 367 U.S. 488, 494 (1961) (First Amendment prohibits limiting public office to those who have or profess belief in certain religious concepts).

The First Amendment rights of pregnant women are also violated by this mandated consent process. Just as the First Amendment guarantees a right to listen and receive information, see e.g., Stanley v. Georgia, 394 U.S. 557, 564 (1964) (right to read obscenity in one's house); it also guarantees its counterpart--the right not to be forced to listen. Cf. Wallace v. Jaffree, 86 L.Ed. 2d at 40 (First Amendment protects certain

conduct and guarantees the corollary rights to refrain from those activities as part of a "broader concept of individual freedom of mind"); Griswold v. Connecticut, 381 U.S. 479, 482-84 (1965) (penumbras of First Amendment include many rights not specifically articulated).

The Constitution has been held to intervene to protect against forced listening where the invasion of privacy and the captivity of the audience is far less severe than it is under statutes regulating the doctor-patient relationship. See e.g. Federal Communications Commission v. Pacifica, 438 U.S. 726 (1978) (regulation of "offensive" material on radio); Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance regulating sound trucks). Making the doctor a mouthpiece of the state, the sanctity of a woman's decision-making process is invaded. Unlike the radio listener who can decide not

to listen to a particular channel, the pregnant woman cannot refuse the information or affect the doctor's obligation to give it to her unless she sacrifices her right to abortion.

There is little more offensive to the notion of a free people than compulsion to speak or to hear morally objectionable and one-sided messages, or efforts by the state to enforce uniformity of belief. Despite the efforts of those opposed to abortion to create the appearance of a resolution of the deep underlying conflict over the value to be ascribed to prenatal life, it is clear that the conflict rages unabated.[4] It remains an

4. See, The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981), The Human Life Bill-Appendix: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., and (fn. cont. on next page).

irresoluble conflict between different conceptions of the meaning and sanctity of life, rooted in differing religious, moral, ethical teachings. The principle enunciated by this Court in Roe v. Wade--that the state may adopt no "theory of life" either to coerce or induce conformity--is the only one consistent with the First Amendment and the preservation of the pluralistic society which it envisioned.

B. Roe v. Wade Advances the Policies of Voluntarism and State Neutrality in Matters of Religion Embedded in the Religious Liberty Guarantees.

The statutes at issue here reflect the type of double-barrelled violation of the First Amendment which Roe v. Wade is designed effectively to avoid. Not only do they

(fn. cont. from preceding page)
The Human Life Bill-S. 158: Report, together with Additional and Minority Views to the Committee on the Judiciary made by its Subcommittee on Separation of Powers, 97th Cong., 1st Sess.

invade the realm of individual conscience by professing a "theory of life" intended to induce women to forgo abortion, they also advance a "theory of life" which is inconsistent with religious and conscientious decisions themselves protected by the religious liberty clauses. By tacitly encouraging adherence to a particular belief, the statutes offend both the principle of voluntarism and the mandate of governmental neutrality embodied in the Free Exercise and Establishment Clauses.

1. The Challenged Statutes Demonstrate that Roe v. Wade is Necessary to Avoid Infringement of the Individual Right to Make and Effectuate a Conscientious Decision on Abortion Protected by the Religious Liberty Clauses.

Abortion ranks as a paramount concern in all major religious traditions. For those of the anti-abortion faiths, actual human life begins at or near conception and abortion is

a grave sin, which destroys God's creation and is analagous to murder. Conversely, in the pro-choice faiths, the preservation of the health and well-being of existing life, and consideration of the responsibilities of parenthood outweigh the interest in potential life and rank among the highest obligations of human beings towards one another and toward God.

The Free Exercise Clause protects the right to believe or disbelieve. Torasco v. Watkins, 367 U.S. 488 (1961). It protects the right to practice one's beliefs, and to act in accordance with them. McDaniel v. Paty, 435 U.S. 618 (1978). It encompasses decisions about daily life which are "rooted in religious belief" rather than personal preference. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

The religious liberty guarantee also shields the exercise of conscience:

decisions that reflect "religious choice" even though not compelled by religious dogma, Thomas v. Review Bd., 450 U.S. 707, 715-716 (1981), and decisions which are based on a "belief that occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God." United States v. Seeger, 380 U.S. 163, 176 (1965).[5] The

5. Though Seeger involved statutory interpretation of the conscientious objector exemption rather than a constitutional holding, the expansive interpretation was influenced by the concern for avoiding preferential treatment of the traditional believer as compared to the non-traditional one. United States v. Seeger, 380 U.S. at 176; Welsh v. United States, 398 U.S. 333 (1970) (Harlan, J., concurring). In Gillette v. United States, 401 U.S. 437 (1971), the selective objector claim, found to be outside the statutory exemption, nonetheless triggered scrutiny under both the Free Exercise and Establishment Clauses.

Court recently restated this longstanding principle in Wallace v. Jaffree:

> the individual's freedom to choose his [her] own creed is the counterpart of his [her] right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the i[illegible]del, the atheist, or the adherent o[illegible] non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience,

> but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful (footnotes omitted).

86 L.Ed. 2d at 40-41. See also Thornton v. Caldor, ___U.S.___, 86 L. Ed. 2d 557, 564 (1985) (O'Connor, Marshall, J.J., concurring) (invalidating a statute protecting Sabbath observers "without according similar accommodation to ethical and religious beliefs and practices of other private employees.")

Rooted in a policy of voluntarism in matters of religion and conscience, the Free Exercise Clause protects against direct and indirect schemes to discourage religious exercise. A state invades the realm of freedom of religion if it purposefully, or

even inadvertently, conditions benefits or exacts a toll that puts "substantial pressure on an adherent to modify his [her] behavior and to violate his [her] belief." Thomas v. Review Board, 450 U.S. at 718; Sherbert v. Verner, 374 U.S. 398, 404-07 (1963). Therefore, content-based, judgmental legislative intervention impinging on the religious and conscientious abortion decision-making process violates the policy of voluntariness underlying the religious liberty guarantees, as well as the right to privacy.

By requiring doctors to give out, and women to hear, information reflecting a theory of life that renders abortion immoral clearly invades the shield afforded by the Free Exercise Clause to the integrity of differing religious and conscientious

beliefs. The information required to be provided under the challenged statutes is designed to advance the view that the fetus is a person from the moment of conception and cause the woman to question her own beliefs and reconsider her decision to have an abortion or to utilize a particular form of birth control.[6] Other constraints on the informed consent process, such as the giving of false, misleading, erroneous and distorted information as to risks and benefits, or the availability of adoption or other

6. The fact that the materials prepared by the State of Pennsylvania might be supplemented or contested in the hands of a particular doctor does not eliminate their coercive element; nor does it obviate the "substantial risk" that the materials will be used as a tool of "state-sponsored indoctrination" in the hands of another doctor. Grand Rapids School District v. Ball, U.S. , 87 L.Ed. 2d 267, 279 (1985). "Such indoctrination, if permitted to occur, would have devastating effects on the right of each individual to determine what to believe (and what not to believe) free of any coercive pressures from the State." Id. at 278. Cf. Levitt v. Committee for Public
(fn. cont. on next page)

services--are designed to induce a woman to renounce abortion or, at the least, to impugn her decision-making process.

The informational requirement regarding "abortifacients" contained in the Illinois statute constitutes a particularly offensive type of moralistic preaching in violation of the constitutional guarantee of religious liberty. In the absence of secular, much less compelling, justification, it intrudes on the decision-making process, and burdens access to the means to effectuate a procreational decision regarding birth control and abortion, in a way which goes

(fn. cont. from preceding page)
Education, 413 U.S. 472, 480 (1973)("[T]he State is constitutionally compelled to assure that the state-sponsored activity is not being used for religious indoctriniation"); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion").

beyond infringing the Free Exercise right to put one's religious and conscientious choices into practice. For example, its impact upon a woman whose religious teachings oppose abortion but who, after considerable soul-searching, has arrived at an individual, conscientious decision to choose an early abortion, or to use a curative drug or a particular form of birth control, poses a unique offense to the Free Exercise Clause. The freedom to follow the dictates of one's conscience in deciding not to follow the dogmatic teachings of one's faith, and to do so without feelings of shame or guilt inflicted by the state, is the complementary component of the constitutional guarantee of free exercise. See Thomas v. Review Board, 450 U.S. at 715-716 ("the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."); Wallace v. Jaffree, 86 L. Ed. 2d at

40.

The Illinois requirement regarding "abortifacients" also demonstrates the way in which women are invidiously affected by restrictions aimed at promoting a particular "theory of life" which restrict the doctor's freedom of conscience regarding matters of ethics and medicine. A woman is entitled to rely on the doctor to provide her with information she requests, and to decide, on the basis of his or her best medical judgment and in light of his or her intimate knowledge of the physical and emotional needs and beliefs of the patient, what other information can or should be disclosed.

The "method of choice" provision of the Pennsylvania statute presents an even greater affront to the constitutionally-mandated respect for the freedom of conscience of both the doctor and the patient. The woman's conscientious decision to have an abortion

is, for all practical purposes, overriden. Not only is she forced to bear a "medical risk" to preserve the fetus, but extreme mental anguish she may suffer over the prospect of a "live birth"--which may itself have served as the basis for her religious and medical decision to abort--is not considered.[7] Moreover, requiring a doctor to knowingly inflict upon his or her patient an increased health risk to preserve the fetus will undoubtedly trample the religious and conscientious, as well as the medical, convictions of countless doctors.

This lack of respect for the conscientious beliefs of doctors concerned

7. This provision thus comes into direct conflict with what is often a medically and religiously mandated decision. For example, Jewish law is interpreted by many to include the pregnant woman's extreme mental anguish (regardless of its specific source) carrying with it suicidal tendencies within the category of life-threatening situations in which abortion is required. Feldman, Marital Relations, Birth Control and Jewish Law 284-286 (1974).

with the well-being of their female patients is in sharp contrast with the Pennsylvania statute's treatment of doctors whose personal beliefs coincide with those of the state. Indeed, the discrimination accomplished by the statute is not at all inadvertent; it is explicit in the statutory scheme. Doctors who are opposed to abortion are protected against being required to participate in abortion under the statute itself.[8] By contrast to this respect for conscientious convictions of those opposed to abortion, the statutes require pro-choice doctors to participate in informed consent processes and

8. Section 3202(d) of the Pennsylvania statute provides:

Right of conscience--It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other

(fn. cont. on next page)

medical practices which violate their conscientious beliefs as well as their ethical and professional commitments.

2. The Challenged Statutes Demonstrate That Roe v. Wade is Necessary to Enforce the Obligation of State Neutrality Commanded by the Religious Clauses.

As Roe v. Wade recognized, statutes which burden women and their doctors in rendering and effectuating the abortion decision as a matter of conscience, violate the obligation of state neutrality on matters of conscience and religion. These cases once again invoke the "constitutionally imposed 'governmental obligation of neutrality' originating in the establishment and free

(fn. cont. from preceding page)
persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

exercise clauses of the First Amendment." Maher v. Roe, 432 U.S. 464, 474, n. 8 (1977), quoting Sherbert v. Verner, 374 U.S. at 409.

Neutrality as between differing religious and non-religious views and practices is a core principle of the First Amendment. It has long been settled that "a state can[not], consistent with the First Amendment, pass laws which...prefer one religion over another," Everson v. Board of Education, 330 U.S. 1, 15 (1947), and that a proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion." Committee for Public Education v. Nyquist, 413 U.S. 756, 792-793 (1973), quoted in Wallace v. Jaffree, 86 L. Ed. 2d at 46 n.50.

The requirement of neutrality is strict where the free exercise of religion is at

issue. See Walz v. Tax Commission, 397 U.S. 664 (1970). The Free Exercise Clause "prohibits misuse of secular governmental programs 'to impede the observance of one or more religions or to discriminate invidiously between religions...even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, 366 U.S. 599 (1961) at 607." Gillette v. United States, 401 U.S. at 462. Thus Sherbert not only held that the absolute Saturday work requirement for unemployment compensation eligibility was an impermissible burden on free exercise of a sabbatarian; it also held that the "unconstitutionality of the disqualification of the Sabbatarian...[is] compounded by...religious discrimination" in that, by contrast to the treatment of the sabbatarian, the emergency labor laws exempted those who were "conscientiously opposed to Sunday work." 374 U.S. at 406.

When recently confronted with the question at issue in Sherbert from the opposite constitutional perspective, the Court reiterated the importance of state neutrality in light of the guarantee of religious liberty. In Thornton v. Caldor, Inc., the Court invalidated a statute which granted Sabbath observers an absolute right to a day off in part because it gave no rights or consideration to "[o]ther employees who have strong and legitimate, but nonreligious reasons for wanting a weekend day off." Thornton v. Caldor, Inc., ___U.S.___, 86 L. Ed. 2d 557, 563 n. 9 (1985). As the concurring Justices noted, the statute improperly granted special protection for Sabbath observers, "without according similar accommodation to ethical and religious beliefs and practices of other private employees," thereby conveying a message "of the endorsement of a particular

belief, to the detriment of those who do not share it." Id. at 564 (O'Connor, and Marshall J. J., concurring).

The overall discriminatory character of the statutes at issue is clear. Women who, out of religious or conscientious conviction, determine that abortion or a particular drug or form of birth control, is proper, are subjected to a program of discouragement and deterrence, while women who for similar reasons are compelled to or opt to bear a child suffer no such hindrance in the effectuation of their religious choice. Those who choose abortion are being burdened, not to advance their health or some independent, secular, and neutral purpose, but for the purpose of inducing them to consider and obey the belief that life begins at conception and abortion is immoral.

Equal treatment of both the woman whose conscience dictates abortion rather than

childbirth and the doctor who assists her requires that these one-sided statutes be invalidated. See also United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970). The lack of compelling let alone colorable interest for these statutes is thus highlighted by the religious discrimination it effects.

Far from advancing maternal health or an objectively informed decision, the goal of the statutes is to convert, or at least shame, women whose conscience dictates abortion, or the use of an "abortifacient," contary to the states' moral and religious positions that abortion is the taking of human life.

This Court has repeatedly held in First Amendment cases that mere disagreement with the content of belief or protected action does not suffice to justify infringement. See e.g., Fowler v. Rhode Island, 345 U.S.

67, 69-70 (1953); Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951); Ballard v. United States, 322 U.S. 78 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943); Only where the free exercise of religion would pose a "substantial threat to public safety, peace and order," Sherbert v. Verner, 374 U.S. at 403, can the state counterpose its moral view against that of the believer. See e.g., Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

If this were not so, then the protection afforded by the religious liberty guarantee of the Constitution would be swallowed up by the moral disapproval that particular beliefs and practices often inspire. Since the women burdened by these statutes seek to obtain a perfectly legal service, the moral position adopted by the states cannot itself satisfy the compelling interest test, let alone

qualify as legitimate in this context.

Moreover, the fact that the state legislatures have taken a position that deprecates a moral decision sacred to dissenting faiths threatens the dangers of intolerance, oppression and sectarian strife that the Religion Clauses were designed to avert. Wallace v. Jaffree, ___U.S.___, 86 L. Ed. 2d 29 (1985); Everson v. Board of Education, 330 U.S. 1, 15-16, 53-55 (Rutledge, J. dissenting). Where as here, an issue is perceived as religious by many, and particularly by dissenting faiths, state sponsorship sacrifices the neutrality necessary to the preservation of religious harmony and the public peace. People ex rel. McCollum, 333 U.S. 203, 228 n. 19 (1948); cf. Grand Rapids School District v. Ball, 87 L. Ed. 2d at 276, 281. James Madison remonstrated that against any state support for religious belief, even purportedly even-handed support:

> Because, it will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion, has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempt of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions...If...we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken of the first fruit of the threatened innovation.

"Memorial and Remonstrance," reprinted in Everson v. Board of Education, 330 U.S. at 69 (Appendix to Rutledge, J. dissenting).

Madison's warning sounds far too contemporary. The effort reflected in the statutes before this Court to advance the belief that life begins at conception, to stop, disparage and discourage abortion and to elevate concern for prenatal life over concern for the rights and needs of pregnant women is part of a program pressed by a new and dangerous religious movement to undo the

separation of church and state guaranteed by the First Amendment. The decision in Roe v. Wade exemplifies the fact that this Court is the ultimate refuge for the freedom of conscience that the principles of religious liberty preserve.

II. THIS COURT IS DUTY-BOUND TO GIVE STRICT SCRUTINY TO STATUTES THAT IMPINGE THE EXERCISE OF FUNDAMENTAL RIGHTS.

The Solicitor General of the United States has filed a brief in these cases which suggests a radical and dangerous departure from our constitutional scheme. The Solicitor's argument that the Court should altogether reverse the constitutional holding of Roe v. Wade or, at a minimum, dilute the constitutional standard for reviewing restrictions on abortion, are both based on his contention that legislatures on every level, and not the Court, should determine what rights are fundamental and the extent to which they will be protected. Essentially, the Solicitor is calling for this Court to abdicate its constitutional function as guardian of individual and civil rights.

Similar arguments have been heard in this Nation during periods when

constitutional rights were under attack. One of the most eloquent responses to the argument for legislative deference was made by Justice Jackson, in a case which is, at its heart, very similar to this one:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

West Virginia State Board of Education v. Barnette, 319 U.S. at 638.

To the argument that the Court lacked competence to protect fundamental rights in the face of competing policy considerations, he replied:

> ...[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot because of our modest

> estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 639-40.

The contention that the Court should defer to the legislatures on a matter of fundamental rights threatens every guarantee of the Bill of Rights. All constitutional rights, whether explicit or implicit, are necessarily defined and shaped by this Court's interpretation of constitutional principle. This includes rights so fundamental as the right to be free of racial segregation, Brown v. Board of Education, 347 U.S. 483 (1954), or of state sponsorship of religious exercises in the schools, Wallace v. Jaffree, 86 L. Ed. 2d 29 (1985); Engel v. Vitale, 370 U.S. 421 (1962). With each one of these decisions and with countless others the Court has faced and survived powerful

pressures from political movements opposed to the Constitution's guarantee of these fundamental rights.[9]

The right to privacy which embraces the right to abortion is not, as the Solicitor suggests less deserving of this Court's rigorous protection because it is implicit in the Bill of Rights. It is, in fact, the foundation of human capacity to exercise all the rights guaranteed in a democracy. As Justice Brandeis wrote:

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a

9. For example, in response to Brown v. Board of Education, its opponents sought to withdraw Supreme Court and lower federal court jurisdiction from school desegregation cases. See, e.g. H.R. 1228, 85th Cong., 1st Sess. (1957), and S. 3467, 85th Cong., 2d Sess. (1958). Likewise, after the decision in Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971), opposition was marshalled in the form of both constitutional (fn. cont. on next page)

part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 487 (1928) (Brandeis, J., dissenting).

Periodically, this nation and our Constitution are threatened by religious and ideological forces which seek safety in conformity and efficacy through coercion. In such times as these, when legislatures are under extreme pressure to undo the Bill of Rights, the Court, as the ultimate guardian of the liberties fundamental to a democracy, is inevitably under attack as well. But the integrity of the Court, the survival of our constitutional system, and the guarantee of individual liberty are preserved, not by acquiescence to these pressures, but by solemn and unswerving fulfillment of the duty conferred upon this Court by the written Constitution.

In sum, the Solicitor challenges the most fundamental principle of the constitutional scheme of checks and

(fn. cont. from preceding page) amendments, see, e.g. H.J. Res. 1035, 92d Cong., 2d Sess. (1972), S.J. Res. 165, 92d Cong., 1st Sess. (1971), H.J. Res. 30, 823, 856, 858, 92d Cong., 1st Sess. (1971); and bills, which received the backing of the Nixon Administration, see H.R. 13915, 13916 92d Cong., 2d Sess. (1972). In the area of school prayer, efforts to circumvent the impact of this Court's decisions in Engel v. Vitale, 370 U.S. 421 (1961) and School District of Abington v. Schemp, 374 U.S. 203 (1963) have included numerous constitutional amendments. See, e.g. the Becker Amendment (1964), the Dirksen amendments (1966, 1967), and the Wylie amendment (H.J. Res. 191, 1971).

Similarly, this Court's decisions in the areas of reapportionment and citizen protection from legislative investigation, have been opposed by legislative attempts to limit the Court's jurisdiction. See Eisenberg, "Congressional Authority to Restrict Lower Federal Court Jurisdiction," 83 Yale Law Journal 498 (1974).

balances--that it is "the province and duty of the judicial department to say what the law is," to declare that "an act of the legislature, repugnant to the constitution is void," and to guarantee that when rights are violated, the "individual has a right to resort to the laws of his country for a remedy." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 166 (1803). This Court has no higher office under the Constitution than to protect individual rights under challenge.

Under any standard of review under the Fourteenth Amendment, the statutes before the Court in these cases must be invalidated. But the protection of the right to abortion, like that of all fundamental constitutional rights, properly calls for undiluted application of strict judicial scrutiny.

CONCLUSION

The liberty of conscience, guaranteed by the First Amendment's prohibition on state sponsorship or imposition of any belief, let alone religious belief--these are cornerstones of our pluralistic democratic society. The battle raging over abortion is not a battle between good and evil, as some may see it, but is rather a battle between differing conceptions of the good. Each conception is grounded in profound religious, moral and ethical principles, and each is equally incomprehensible and offensive to those who believe otherwise.

This Court's decision in Roe v. Wade charts the only course acceptable under our Constitution--refusing to government the power to adopt a "theory of life," and guaranteeing to women a sphere of untrammeled privacy for the exercise and effectuation of their own, differing conscientious

convictions. Any departure from the principles of Roe v. Wade threatens not only the right to abortion, but the foundation of individual freedom under the Constitution. As James Madison said: "[I]t is proper to take alarm at the first experiment on our liberties..." "Memorial and Remonstrance" in Everson v. Board of Education, 330 U.S. at 65-66 (Appendix to Opinion of Rutledge, J., dissenting).

WHEREFORE, the challenged statutes should be invalidated.

Respectfully submitted,

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APPENDIX

APPENDIX A

RELIGIOUS COALITION FOR ABORTION RIGHTS (1979)

Statement of Purpose: The Religious Coalition for Abortion Rights is an organization of national religious bodies which, on the basis of faith and moral conviction and in the light of constitutional guarantees of privacy and religious freedom, seeks to encourage and coordinate support for safeguarding the legal option of abortion; for ensuring the right of individuals to make decisions concerning abortion in accordance with their consciences and responsible medical practice; and for opposing efforts to deny these right through constitutional amendment, or federal and state legislation.

Rationale: Many religious organizations representing diverse denominations have adopted the position that decisions concerning abortion would be made according

to individual conscience, consistent with responsible medical practice, free from the threat of criminal penalty...

However, a vocal minority would deny the option of legal abortion to all. Their personal belief that human life exists from the moment of conception has prompted their efforts to nullify the Supreme Court decision through a Constitutional amendment which would restrict access to abortion. One theological view would thus become law, binding on Americans of all faiths.

It is vital to increase public awareness of this danger. Enactment of such legislation would violate the religious freedom of every citizen by circumventing the First Amendment guarantee of church-state separation.

APPENDIX B

AMERICANS FOR RELIGIOUS LIBERTY (1982)

Statement of Principles: We believe in the American tradition of religious and intellectual freedom within a secular democratic state. We believe in the philosophy of Thomas Jefferson and James Madison which gave birth to this tradition. We believe in the American Constitution and the Bill of Rights which make it the law of the land.

A free and secular democratic state guarantees religious liberty. It guarantees equal freedom to the religious and the non-religions. It makes religious faith a private matter and gives no special privileges to any religion or idea or practice.

A free and secular democratic state secures personal freedom and privacy. It defends the individual against the tyranny of

transient majorities or determined minorities. It allows all people to follow their own consciences and restrains them only when they harm the public welfare. It makes abortion and sexual behavior between consenting adults issues of personal choice...

APPENDIX C

The following are excerpts from statements about abortion by national religious organizations:

AMERICAN BAPTIST CHURCHES, U.S.A.
(General Board, 1981)

Public law, enacted by human reason and enforced by state power, can never fully express the moral sensitivity of Christian love. We are therefore grateful for the Constitutional protection of religious freedom which guarantees our right to make personal moral decisions based on religious

principles.

We recognize that Christian persons of sensitive and informed conscience find themselves on differing sides of the abortion issue. In our Baptist tradition the integrity of each person's conscience must be respected; therefore, we believe that abortion must be a matter of responsible, personal decision.

AMERICAN ETHICAL UNION
(1965, reaffirmed 1979)

Abridgement of individual civil and human liberties as guaranteed by the United States Constitution is a danger to all. Among those liberties that must continue free of threat is the right of every woman to self-determination insofar as continued pregnancy is concerned.

AMERICAN FRIENDS SERVICE COMMITTEE
(1970)

On religious, moral, and humanitarian grounds, therefore, we arrived at the view that it is far better to end an unwanted pregnancy than to encourage the evils resulting from forced pregnancy and childbirth. At the center of our position is a profound respect and reverence for human life, not only that of the potential human being who should never have been conceived, but that of the parent, the other children and the community of man.

Believing that abortion should be subject to the same regulations and safeguards as those governing other medical and surgical procedures, we urge the repeal of all laws limiting either the circumstances under which a woman may have an abortion or the physician's freedom to use his best professional judgment in performing it.

AMERICAN HUMANIST ASSOCIATION
(Annual Conference, 1977)

We affirm the moral right of women to become pregnant by choice and to become mothers by choice. We affirm the moral right of women to freely choose a termination of unwanted pregnancies. We oppose actions by individuals, organizations and governmental bodies that attempt to restrict and limit the women's moral right and obligation of responsible parenthood.

AMERICAN JEWISH CONGRESS
(Biennial Convention, 1982)

The American Jewish Congress has long recognized that reproductive freedom is a fundamental right, grounded in the most basic notions of personal privacy, individual integrity and religious liberty. Jewish religious traditions hold that a woman must be left to her own conscience and God to decide for herself what is morally correct. The fundamental right to privacy applies to

contraception to avoid unintended pregnancy as well as to freedom of choice on abortion to prevent an unwanted birth.

The American Jewish Congress, therefore,

--Reaffirms its unwavering support for the Supreme Court decisions, including Roe v. Wade and Doe v. Bolton, which recognize that the Constitution guarantees women freedom of choice with respect to abortion.

--Reaffirms its opposition to all efforts--whether through Constitutional amendment, simple legislative fiat, or attacks on the jurisdiction of the courts--that would restrict or burden a woman's right to choose to terminate a pregnancy.

--Rejects any efforts that would deny individual religious liberty to either clergy or lay people who, by virtue of their sincerely-held religious beliefs, may differ in interpreting when to attribute

"personhood" to prenatal life.

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
(1973)

It was voted that the Baptist Joint Committee on Public Affairs go on record as opposed to the Buckley-Hatfield amendment and any like or similar constitutional amendments, and that the staff be authorized to take all available action to oppose them.

B'NAI B'RITH WOMEN
(Biennial Convention, 1976,
reaffirmed, 1978)

We wholeheartedly support the concepts of individual freedom of conscience and choice in the matter of abortion. Any constitutional amendment prohibiting abortion would deny to the population at large their basic rights to follow their own teachings and attitudes on this subject which would threaten First Amendment rights.

CATHOLIC WOMEN FOR REPRODUCTIVE RIGHTS
(1985)

CWFRR joins people of other religious

traditions in respecting the pluralism of religious, moral and ethical views. Thus we support the Supreme Court decisions which promote First Amendment freedoms by leaving each woman free to follow her own moral and religious convictions about abortion.

CWFRR, with faithful Catholic theologians, married couples, sisters and many other individuals and groups, dissents from the position taken by the hierarchy of the Catholic Church that every abortion is morally wrong. CWFRR affirms that there are circumstances in which a woman's choice to have an abortion may be morally justifiable.

CWFRR thus opposes all legislation which would in any way restrict a woman's right to control her reproduction.

CATHOLICS FOR A FREE CHOICE
(1975)

We affirm the religious liberty of Catholic women and men and those of other religions to make decisions regarding their

own fertility free from church or governmental intervention in accordance with their own individual conscience.

CENTRAL CONFERENCE OF AMERICAN RABBIS
(Annual Convention, 1975)

We believe that in any decision whether or not to terminate a pregnancy, the individual family or woman must weigh the tradition as they struggle tc formulate their own religious and moral criteria to reach their own personal decision. We believe that the proper focus for formulating these relgious and moral criteria and for making this decision must be the individual family or woman and not the state or other external agency.

As we would not impose the historic position of Jewish teaching upon individuals nor legislate as normative for society at large, so we would not wish the position of any other group imposed on the Jewish community or the general population.

We affirm the legal right of a family or a woman to determine on the basis of their or her own religious and moral values whether or not to terminate a particular pregnancy. We reject all constitutional amendments which would abridge or circumscribe this right.

CHRISTIAN CHURCH (DISCIPLES OF CHRIST)
(General Assembly, 1975)

WHEREAS, the Christian Church (Discpiles of Christ) has proclaimed that in Christ, God affirms freedom and responsibility for individuals, and

WHEREAS, legislation is being introduced into the U.S. Congress which would embody in law one particular opinion concerning the morality of abortion...

THFREFORE BE IT RESOLVED, that the General Assembly of the Christian Church (Disciples of Christ)

--Affirm the principle of individual liberty, freedom of individual conscience, and sacredness of life for all persons.

--Respect differences in religious beliefs concerning abortion and oppose, in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans.

EPISCOPAL CHURCH
(General Convention, 1982)

RESOLVED: That the Episcopal Church express its unequivocal opposition to any legislation on the part of the national or state governments which would abridge or deny the right of individuals to reach informed decisions in this matter and to act upon them.

EPISCOPAL WOMEN'S CAUCUS
(Annual Meeting, 1978)

We are deeply disturbed over the increasingly bitter and divisive battle being waged in legislative bodies to force continuance of unwanted pregnancies and to limit an American woman's right to abortion.

We believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise.

FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT
(1981)

Although the Jewish tradition regards children as a blessing, a gift of life itself, the tradition permits the abortion of an unborn child in order to safeguard the life and the physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether a fetus resembles "a person." They did not think it possible to arrive at a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what

it means to be human.

We recognize that abortion is a tragic choice. Any prospective parent must make an agonizing decision between competing claims--the fetus, health, the need to support oneself and one's family, the need for time for a marriage to stabilize, responsibility for other children and the like. Some of us consider abortion to be immoral except under the most extraordinary circumstances. Yet we all empathize with the anguish of those who must make the decision to abort or not to abort.

LUTHERAN CHURCH IN AMERICA
(Biennial Convention, 1970,
reaffirmed 1978)

Since the fetus is the organic beginning of human life, the termination of its development is always a serious matter. Nevertheless, a qualitative distinction must be made between its claims and the rights of a responsible person made in God's image who

is in living relationships with God and other human beings. This understanding of responsible personhood is congruent with the historical Lutheran teaching and practice whereby only living persons are baptized.

On the basis of the evangelical ethic, a woman or couple may decide responsibly to seek an abortion. Earnest consideration should be given to the life and total health of the mother, her responsibilities to others in her family, the stage of development of the fetus, the economic and psychological stability of the home, the laws of the land, and the consequences for society as a whole.

MORAVIAN CHURCH IN AMERICA,
NORTHERN PROVINCE
(1974)

Whereas the Moravian Church believes in the sacredness of life and in the quality of life, and whereas we believe that abortion should not be used as a method of birth control nor a means of controlling

population, and whereas Christian faith calls us to affirm the freedom of persons as well as the sanctity of life, be it resolved that abortion should be a matter of responsible personal decision, with continuing counseling provided if desired.

NATIONAL COALITION OF AMERICAN NUNS
(1982)

For thirteen years, the National Coalition of American Nuns has debated the abortion issue.

While we continue to oppose abortion, in principle and in practice, we are likewise convinced that the responsibility for decisions in this regard resides primarily with those who are directly and personally involved.

NATIONAL COUNCIL OF JEWISH WOMEN
(National Convention, 1969,
reaffirmed, 1979, 1982)

The members of NCJW reaffirm the strong commitment "to work to protect every woman's individual right to choose abortion and to

eliminate any obstacles that would limit her reproductive freedom."

NATIONAL FEDERATION OF TEMPLE SISTERHOODS
(Biennial Assembly, 1975)

NFTS affirms our strong support for the right of a woman to obtain a legal abortion, under conditions now outlined in the 1973 decision of the United States Supreme Court. The Court's position established that during the first two trimesters, the private and personal decision of whether or not to continue to terminate an unwanted pregnancy should remain a matter of choice for the woman; she alone can exercise her ethical and religious judgment in this decision.

Only by vigorously supporting this individual right to choose can we also ensure that every woman may act according to the religious and ethical tenets to which she adheres.

NATIONAL SERVICE CONFERENCE,
AMERICAN ETHICAL UNION
(1976, reaffirmed 1979)

We believe in the right of each individual to exercise his or her conscience; every woman has a civil and human right to determine whether or not to continue her pregnancy. We support the decision of the United States Supreme Court of January 22, 1973 regarding abortion.

We believe that no religious belief should be legislated into the legal structure of our country; the state must be neutral in all matters related to religious concepts.

NORTH AMERICAN FEDERATION OF TEMPLE YOUTH
(1981)

BE IT RESOLVED: that NFTY continues to strongly support the right of a woman to choose to obtain a safe, legal abortion, and that NFTY opposes any constitutional amendment that could lead to the restriction of that right.

PIONEER WOMEN/NA'AMAT
(Biennial Convention, 1983)

Reproductive choice must be recognized as a matter of individual conscience outside the realm of government intrusion. We oppose attempts--whether by Constitutional amendment, legislation, judicial review or government regulation--to restrict women's access to safe and legal abortion, to bar financial assistance to women seeking abortion or to violate the confidentiality of family planning services.

PRESBYTERIAN CHURCH, U.S.A.
(General Assembly, 1983)

The church's position on public policy concerning abortion should reflect respect for other religious traditions and advocacy for full exercise of religious liberty. The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this pluralism of beliefs which lead us to the

conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference.

Consequently, we have a responsibility to work to maintain a public policy of elective abortion, regulated by the health code, not the criminal code. The legal right to have an abortion is a necessary prerequisite to the exercise of conscience in abortion decisions. Legally speaking, abortion should be a woman's right because, theologically speaking, making a decision about abortion is, above all, her responsibility.

As Presbyterians and U.S. citizens we have a responsibility to guarantee every woman the freedom of reproductive choice. We affirm the intent of existing law in the United States regarding abortion: protecting

the pregnant woman.

REFORMED CHURCH IN AMERICA
(General Synod, 1975)

To use, or not to use, legal abortion should be a carefully considered decision of all the persons involved, made prayerfully in the love of Jesus Christ.

Christians and the Christian community should play a supportive role for persons making a decision about or utilizing abortion.

REORGANIZED CHURCH OF JESUS CHRIST
OF LATTER DAY SAINTS
(1974, reaffirmed 1980)

We affirm that parenthood is partnership with God in the creative processes of the universe.

We affirm the necessity for parents to make responsible decisions regarding the conception and nurture of their children.

We affirm a profound regard for the personhood of the woman in her emoticnal, mental and physical health; we also affirm a

profound regard and concern for the potential of the unborn fetus.

We affirm the inadequacy of simplistic answers that regard all abortions as murder or, on the other hand, regard abortion only as a medical procedure without moral significance.

We affirm the right of the woman to make her own decision regarding the continuation or termination of problem pregnancies.

UNION OF AMERICAN HEBREW CONGREGATIONS
(Biennial Convention, 1975,
reaffirmed, 1981)

The UAHC reaffirms its strong support for the right of a woman to obtain a legal abortion on the constitutional grounds enunciated by the Supreme Court in its 1973 decision...This rule is a sound and enlightened position on this sensitive and difficult issue, and we express cur confidence in the ability of the woman to exercise her ethical and religious judgment

in making her decision.

The Supreme Court held that the question of when life begins is a matter of religious belief and not medical or legal fact. While recognizing the right of religious groups whose beliefs differ from ours to follow the dictates of their faith in this matter, we vigorously oppose the attempts to legislate the particular beliefs of those groups into the law which governs us all. This is a clear violation of the First Amendment. Furthermore,it may undermine the development of interfaith activities. Mutual respect and tolerance must remain the foundation of interreligious relations.

UNITARIAN UNIVERSALIST ASSOCIATION
(General Assembly, 1978)

WHEREAS, religious freedom under the Bill of Rights is a cherished American right; and

WHEREAS, right to choice on contraception and abortion are important

aspects to the right of privacy, respect for human life and freedom of conscience of women and their families; and

WHEREAS, there is increasing religious and political pressure in the United States to deny the foregoing rights;

BE IT RESOLVED: That the 1978 General Assembly of the Unitarian Universalist Association once again affirms the 1973 decision of the Supreme Court of the United States on abortion and the member societies and individual members

BE IT FURTHER RESOLVED: That the 1978 General Assembly of the Unitarian Universalist Association strongly opposes any denial or restriction of federal funds, or any Constitutional amendment, or the calling of a national Constitutional Convention to propose a Constitutional amendment, that would prohibit or restrict access to legal abortion.

UNITARIAN UNIVERSALIST WOMEN'S FEDERATION
(Biennial Convention, 1975,
reaffirmed 1979, 1981)

The Unitarian Universalist Women's Federation reaffirm[s] the right of any woman of any age or marital or economic status to have an abortion at her own request upon consultation with her physician.

UNITED CHURCH OF CHRIST
(General Synod, 1981)

The question of when life [personhood] begins is basic to the abortion debate. It is primarily a theological question, on which denominations or religious groups must be permitted to establish and follow their own teachings.

Every woman must have the freedom of choice to follow her personal and religious and moral convictions concerning the completion or termination of her pregnancy.

UNITED METHODIST CHURCH
(General Conference, 1976, 1984)

When an unacceptable pregnancy occurs, a family, and most of all the pregnant woman, is confronted with the need to make a difficult decision. We believe that continuance of a pregnancy which endangers the life or health of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be, is not a moral necessity. In such a case, we believe the path of mature Christian judgment may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court decisions. We encourage women in counsel with husbands, doctors, and pastors to make their own responsible decisions concerning the personal or moral questions surrounding the issue of abortion. (Resolution on Responsibile Parenthood, 1976).

Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion (Social Principles, 1984).

UNITED METHODIST CHURCH,
NATIONAL YOUTH MINISTRY ORGANIZATION
(Biennial Convocation, 1983)

Freedom of choice in problem pregnancies must be based on the moral judgment of the involved individuals.

Where there is no consistent medical, ethical, or theological consensus, the U.S. Constitution should not be used to force one theological view on all citizens who may believe otherwise.

The U.S. Supreme Court decision of Roe

v. Wade in 1973 guarantees a woman the right to make a personal decision regarding termination of a pregnancy. Any amendment to deconstitutionalize the issue of abortion and invalidate the 1973 decision could set a precedent for endangering all our civil liberties.

UNITED METHODIST CHURCH, WOMEN'S CHURCH,
GENERAL BOARD OF GLOBAL MINISTRIES
(1975, reaffirmed 1979, 1980)

We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise.

UNITED PRESBYTERIAN CHURCH IN THE U.S.A.
(General Assembly, 1972,
reaffirmed 1978)

Whereas, God has given persons the responsibility of caring for creation as well as the ability to share in it, and has shown his concern for the quality and value of human life; and

Whereas, sometimes when the natural ability to create life and the moral and spiritual ability to sustain it are not in harmony, the decisions to be made must be understood as moral and ethical ones and not simply legal;

Therefore, in support of the concern for the value of human life and human wholeness...the 184th General Assembly:

b. Declares that women should have full freedom of personal choice concerning the competion or termination of their pregnancies bnd that artificial or induced termination of pregnancy, therefore, should not be

restricted by law, except that it be performed under the direction and control of a properly licensed physician.

UNITED SYNAGOGUE OF AMERICA
(Biennial Convention, 1975)

"In all cases 'the mother's life takes precedence over that of the foetus' up to the minute of its birth. This is to us an unequivocal principle. A threat to her basic health is moreover equated with a threat to her life. To go a step further, a classical responsum places danger to one's psychological health, when well established, on an equal footing with a threat to one's physical health." (1967)

(A)bortions, "though serious even in the early stages of conception, are not to be equated with murder, hardly more than is the decision not to become pregnant."

The United Synagogue affirms once again its position that "abortions involve very serious psychological, religious, and moral

problems, but the welfare of the mother must always be our primary concern."

WOMEN OF THE EPISCOPAL CHURCH
(Triennial Meeting, 1973)

WHEREAS the Church stands for the exercise of freedom of conscience by all and is required to fight for the right of everyone to exercise that conscience, THEREFORE, BE IT RESOLVED that the decision of the U.S. Supreme Court allowing women to exercise their conscience in the matter of abortion be endorsed by the Church.

WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
(Biennial Convention, 1982)

Reverence for life is the cornerstone of our Jewish heritage. Since abortion in Jewish law is primarily for the mother's physical or mental welfare we deplore the burgeoning casual use of abortion. Abortion should be "legally available, but ethically restricted. Though the abortion of a fetus is not equivalent to taking an actual life,

it does represent the destruction of potential life and must not be undertaken lightly...."

However, Women's League also believes that the practice of the principle of the separation of church and state guaranteed by our Constitution has kept our nation strong and preserved full freedom for the individual. Women's League believes that transmitting religious values is the responsibility of the religious sector.

YOUNG WOMEN'S CHRISTIAN
ASSOCIATION OF THE U.S.A.
(1979)

As an organization rooted in the Christian faith, the YWCA is deeply conscious of the difficult personal and ethical choices raised by the issue of abortion.

The position of the YWCA is not "pro-abortion." It is a position supporting a woman's right to make an individual decision based upon her own religious and

ethical beliefs and her physician's guidance. The answer to the question, "When does personhood begin?" must remain in the ethical and religious realm.

Since there is a wide variation of opinion among religious groups and individuals in our pluralistic society as to when personhood begins and what an ethical decision on abortion may be in different circumstances, the YWCA holds that no one religious belief should be mandated by law. Our government is expressly comManded to make no law establishing any one religion or prohibiting free expression of religion.

APPENDIX D

A CALL TO CONCERN
(Signed by 220 American religious ethicists in 1978)

The increasing urgency of the issue of abortion rights requires us as teachers and writers of religious ethics to speak out.

Abortion is a serious and sometimes tragic procedure for dealing with fetal life. It raises important ethical issues and cannot be blandly legitimized by the mere whim of an individual. Nevertheless, it belongs in that large realm of often tragic sctions where circumstances can render it a less destructive procedure than the rigid prolongation of pregnancy.

We support the Supreme Court decisions of 1973 which had the effect of removing abortion from the criminal law codes. The Court did not appeal to religion or ethics in arriving at its judgment, but we believe the

decision to have been in accord with sound ethical judgment. Taking note of the fact that theologians, as well as other experts, disagree on the fundamental moral question of when life begins, the Court decided that the law ought not to compel the conscience of those WHo believe abortion to be in harmony with their moral convictions.

In the last four years, however, those decisions have been subjected to a relentless attack from those who take the absolutist position that it is always wrong to terminate a pregnancy at any time after the moment of conception. Those who take this absolutist position have not hesitated to equate abortion at any stage of pregnancy with murder or manslaughter. From such an extreme viewpoint, all legal means are considered justified if they limit abortion, no matter what the human consequences for poor women and others--as in the recent efforts to deny

Medicaid funds and to prohibit use of public hospitals for abortion services.

We feel compelled to affirm an alternative position as a matter of conscience and professional responsibility.

1. <u>The most compelling argument against the inflexibility of the absolutist position is its cost in human misery.</u> The absolutist position does not concern itself about the quality of the entire life cycle, the health and well-being of the mother and family, the question of emotional and economic resources, the cases of extreme deformity. Its total preoccupation with the status of the unborn renders it blind to the well-being and freedom of choice of persons in community.

2. <u>"Pro-life" must not be limited to concern for the unborn; it must include a concern for the quality of life as a whole.</u> The affirmation of life in Judeao-Christian ethics requires a commitment to make life

healthy and whole from beginning to end. Considering the best medical advice, the best moral insight, and a concern for the total quality of the whole life cycle for the born and the unborn, we believe that abortion may in some instances be the most loving act possible.

3. We believe it is wrong to deny Medicaid assistance to poor women seeking abortions. This denial makes it difficult for those who need it most to exercise a legal right, and it implies public censure of a form of medical service which in fact has the moral support of major religious groups.

4. We are saddened by the heavy institutional involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into law, and we view this as a seirous threat to religious liberty and freedom of conscience. We acknowledge the

legal right of all individuals and groups, both religious and secular, to seek laws that reflect their religious and ethical beliefs. But the institutional mobilization of Roman Catholic dioceses, including massive financial contributions by those dioceses to the National Committee for a Human Life Amendment, is inappropriate on this issue. If successful, it would violate the deeply held religious convictions of individual members and official bodies of many other religious groups about when human personhood begins, the relative rights of a woman and a fetus, and responsible family life. This is particularly a problem when there is no clear majority opinion on these fundamental issues nor an adequate social base of consensus for legitimate and enforceable legislation.

5. We call upon the leaders of religious groups supporting abortion rights to speak out more clearly and publicly in

response to the dangerously increasing influence of the absolutist position. There may be some ecumenical risks in such candor, but those risks have already been assumed by those who have pressed the absolutist position on religious grounds. In the long run, the true test of ecumenical authenticity is the ability to sustain dialogue and friendship in spite of very sharp disagreements on matters of substance.

Nos. 84-495 and 84-1379

Supreme Court, U.S.
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IN THE

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October Term, 1985

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Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,
Appellees.

EUGENE F. DIAMOND, *et al.*,
Appellants,

v.

ALLAN G. CHARLES, *et al.*,
Appellees.

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Interest of *Amicus Curiae*

Robert Abrams, as Attorney General of the State of New York, submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4.

Since 1970, the State of New York has recognized that the right of privacy incorporates the right of a woman to choose to terminate her pregnancy up to the point of viability, subject to reasonable restrictions calculated to protect the health and safety of the woman. *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972); N.Y. Penal Law § 123.05(3). This Court likewise recognized, in 1973, that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

If *Roe* v. *Wade* were to be overruled, as urged by the Solicitor General,* and New York were to adhere to its tradition of recognizing the right of a woman to choose to have an abortion, New York and other states choosing to uphold such a right would be faced with meeting an enormous demand for the service from out-of-state residents. The magnitude of this demand would be extraordinary, given the wide acceptance of and reliance upon abortion since *Roe v. Wade* was decided.

* The brief submitted by the Solicitor General as *amicus curiae* will be cited as "S.G. at ——."

In explicitly recognizing that the right to choose to have an abortion is implicit in the right of privacy protected by our Constitution, this Court guaranteed that its exercise, as with the exercise of other constitutionally protected rights, would not be dependent upon the vicissitudes of political controversy. *See Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). The decision whether to obtain an abortion, as with other deeply personal choices regarding privacy and reproductive decisions intertwined with religious and moral beliefs, is precisely the type of right most in need of such explicit constitutional protection. New York has aggressively protected its citizens from attacks upon these rights in the past, and therefore submits this brief *amicus curiae* in response to that submitted by the Solicitor General urging this Court to overrule *Roe* v. *Wade*.

Statement of the Cases

In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495, the Court of Appeals for the Third Circuit held unconstitutional sections of a Pennsylvania law requiring that the method of abortion used be one that would most likely result in a live birth, even if it would cause greater (though not significantly greater) risk to the mother; that a second doctor be present for all post-viability abortions even if a medical emergency dictates an immediate abortion; that certain information be provided to a patient before an abortion is performed, for the purpose, as the court found, of dissuading the woman from having an abortion, regardless of whether the woman's physician deems the information relevant to her decision; and that fa-

cilities providing abortion services file detailed reports subject to public disclosure. The court also enjoined operation of a provision that required a minor seeking an abortion to obtain parental consent or a court order, on the ground that no safeguards had been adopted to ensure that the judicial alternative would be expeditious and would protect the minor's confidentiality.

In *Diamond* v. *Charles*, No. 84-1379, the Court of Appeals for the Seventh Circuit held unconstitutional a section of Illinois law that made it a felony to fail to conform to a specified standard of care in performing an abortion, and thereby to cause the death of a viable fetus, finding that the provision failed to afford due deference to the viability determination of the attending physician and was impermissibly vague. A similar provision as to "possibly viable" fetuses was held unconstitutional because it ran afoul of *Roe* v. *Wade*'s holding that the State does not have a compelling interest in protecting fetuses unless they are actually viable. The Seventh Circuit also struck down a requirement that physicians inform women that certain birth control methods are "abortifacients," defined as any substance or device known to cause fetal death. A fetus is in turn defined to include a fertilized cell, thus making an intrauterine device, and other common means of birth control, abortifacients. The lower court held that the statute impermissibly imposed the State's theory of when life begins upon the physician and the patient.

None of the parties in these two cases urged that *Roe* v. *Wade* be overruled. Indeed, both cases have been consistently briefed and argued within the framework established by *Roe* v. *Wade* and subsequent cases. ***E.g., City of Akron***

v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The Department of Justice is not a party to either case. Nonetheless, the Solicitor General has taken the extraordinary step of using these two cases to urge the Court to perform an unprecedented *volte-face*. The Government asks that the right to choose to have an abortion be repudiated and that an independent right of privacy, on which the right of abortion is based, be eliminated from the freedoms protected by our Constitution.

Summary of Argument

The Solicitor General's arguments are without merit. They ignore a firmly established line of precedent protecting our rights to be left alone by government, to choose how to conduct our own lives, and to decide for ourselves when and whether to marry or to conceive or bear children. *E.g., Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Moreover, they disregard the important principle of *stare decisis*, a principle recognized by this Court in this very context just two years ago. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983). Finally, they ignore the very real likelihood of social and political chaos should this Court overrule *Roe* v. *Wade*.

ARGUMENT

Only twelve years ago, this Court held that the right of personal privacy—which finds its doctrinal sources in decisions dating back to the nineteenth century—"is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court has adhered to this principle in no fewer than twelve cases in the ensuing years.* Because this Court has consistently and repeatedly followed its decision, the right recognized in *Roe* has become not only a part of our constitutional landscape, but an element widely perceived to be part of the nation's social fabric.

The reasons for adhering to *stare decisis*, generally and in this context, are manifold. Among them are

> the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Even as to constitutional questions, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, —— U.S. ——, ——, 104 S.Ct. 2305, 2311 (1984). For "in a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem* v. *Helm*, 463 U.S. 277, 311 (1983) (Burger, C.J., dissenting), *quoting City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. at 419-20.

Undoubtedly, the passions, both moral and political, which surround the abortion debate have motivated some to counsel the Court to depart from recent decisions. Passionate debate, however, attends many issues which implicate constitutional concerns, and its tenacity surely cannot be an acceptable basis for abjuring reasoned adherence to announced principles. Only by "circumspect observance" of the principle of *stare decisis* "can the wisdom of this Court as an institution transcending the moment . . . be brought to bear on the difficult problems that confront [it]." *Green* v. *United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting). *See Oregon* v. *Kennedy*, 456 U.S. 667, 691-92 n. 34 (1982) (Stevens, J., concurring).

Indeed, this Court only two years ago found "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*." *Akron*, 462 U.S. at 419-20 n.1. Among them were the special consideration afforded the issues in *Roe*, and the repeated adherence in subsequent cases to the basic principle there announced. *Id.* No doctrinal development has appeared since *Roe* v. *Wade*, much less *Akron*, that in any sense diminishes the Court's conclusion that the right to privacy encompasses the right of a woman to choose whether to terminate a pregnancy.

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* *See, City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983); *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983); *H.L.* v. *Matheson*, 450 U.S. 398 (1981); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975).

Each of the so-called "textual, historical, and doctrinal" flaws of *Roe* v. *Wade* decried by the Solicitor General, S.G. at 2, was identified by the dissenters in *Roe* and rejected by the Court. Thus, it was argued that the historical coincidence of the passage of laws criminalizing abortion with the passage of the Fourteenth Amendment supports the contention that the Amendment was not intended to restrict such legislative action, 410 U.S. at 174-77 (Rehnquist, J., dissenting); that the right of privacy, as previously identified by the Court, had no application in the abortion area, *id.* 172-73; and that barring state legislatures, as a matter of constitutional law, from entering into the area of procreative choice, in the absence of textual support, amounted to judicial legislation and usurpation of majoritarian prerogatives, *id.*; *Doe* v. *Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting). The Solicitor General brings nothing new to the arguments, and cites not one case decided since *Roe* in support of them.

Since *Roe* v. *Wade*, the Court has been called to delineate more fully the fundamental right to choose an abortion. In varying factual circumstances, it has had to weigh the states' competing interests in protecting maternal health and in the future health of the fetus. The continuing need for the Court to furnish guidance in this area does not, however, argue for a doctrinal retraction of *Roe* v. *Wade*. Constitutional adjudication of rights secured by the Bill of Rights often involves difficult tasks of reconciliation and line drawing. Obviously, individual rights cannot be jettisoned merely because their application in varying contexts may be difficult. To cite but one example, for more than a generation this Court has wrestled with the question of religious observances in the public schools, *see Wallace* v. *Jaffree*, —— U.S. ——, 105 S.Ct. 2479 (1985), without retreating from the principles announced in *Engel* v. *Vitale*, 370 U.S. 421 (1962).

Both the states and countless individuals have relied upon the rights secured by *Roe* v. *Wade* and its progeny in ordering their affairs and lives. Based on these decisions, states have attempted to establish a uniform framework within which health planning and regulatory decisions can be made. *See e.g., Westchester Women's Health Organization, Inc.* v. *Whalen*, 475 F. Supp. 734 (S.D.N.Y. 1979) (state licensing regulations for ambulatory care clinics providing abortion services are within the guidelines enunciated by this Court); *Roman Catholic Diocese* v. *New York State Department of Health*, —— A.D.2d ——, 490 N.Y.S.2d 636 (3d Dept. 1985) (New York relied on *Akron* in deciding to approve the addition of abortion services to two family planning out-patient clinics); *Schulman* v. *New York City Health & Hospitals Corp.*, 38 N.Y.2d 234 (1975) (reporting requirements of the New York City Health Code within the strictures of *Roe* v. *Wade*).

The overruling of *Roe* v. *Wade* would impose an extraordinary burden upon those states which would continue to allow women to choose to terminate their pregnancies in the face of decisions by other states not to do so. For example, when New York amended its penal law in 1970 to permit licensed physicians to provide abortion services for any consenting woman less than twenty-four weeks pregnant, N.Y. Penal Law § 125.05(3), the State was flooded with women seeking this service.* The magnitude of the burden

* During the first fifteen months after this liberalized bill became effective, 64.5 percent of the abortions performed in New York City were performed on non-residents. Guttmacher, *The Genesis of Lib-*

(footnote continued on next page)

that would be imposed upon New York should *Roe* v. *Wade* be rejected would be all the greater than it was in 1970, given the increased acceptance of abortion in our society and the increased demand for it since *Roe* v. *Wade* was decided.

Individuals have relied upon the right of privacy, which encompasses the right to choose to have an abortion, in planning their families and controlling their destinies. If *Roe* v. *Wade* is overruled, as the Solicitor General urges, and the fundamental right of privacy called into question, an individual's ability to plan when to have children, and to insure that each child is a wanted child, will be left largely to chance, depending upon the state in which one resides, the latest election or whether one is rich or poor.

As with the school prayer issue, the continuing controversy over the right to an abortion makes it clear that such an important right cannot be left to shifting political majorities.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, and free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

eralized Abortion in New York, 23 Case W. Res. L. Rev. 756, 766 (1972). During the first twelve months alone, approximately 55,000 women from eight states alone—New Jersey, Ohio, Michigan, Illinois, Pennsylvania, Florida, Massachusetts and Connecticut—traveled to New York City to obtain legal abortions. *Id.*

West Virginia State Board of Education v. *Barnette*, 319 U.S. at 638; *see Engel* v. *Vitale*, 370 U.S. at 429-30.* Any decision undercutting *Roe* v. *Wade* and its underlying principles would make it impossible for "citizens [to] have confidence that the rules on which they rely in ordering their affairs . . . , are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Department of Health* v. *Florida Nursing Home Association*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (footnote omitted).

In deciding *Roe* v. *Wade*, the Court confronted the need to give meaning to the concept of due process, a concept that "has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Aware that "liberty" is not merely "a series of isolated points pricked out" in terms of guarantees of the Bill of Rights,

* The New York Legislature, for example, repealed New York's abortion statute in 1972, but then Governor Rockefeller vetoed the repeal, reminding the Legislature of the Report of the Governor's Commission Appointed to Review New York State's Abortion Law (March 1968), which found that "the then-existing, 19th century, near-total prohibition against abortion was fostering hundreds of thousands of illegal and dangerous abortions. . . . discriminating against women of modest means. . . . , promoting hypocrisy and, ultimately, human tragedy. . . . I can see no justification now for repealing this reform and thus condemning hundreds of thousands of women to the dark age once again." Governor's Veto Messages, 1972, *reprinted* in N.Y.S. Legis. Annual-1972, at 423. Significantly, Governor Rockefeller noted,

> the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of the majority of the people of New York State. The very intensity of this debate has generated an emotional climate in which the very truth about abortions and about the present State abortion law have become distorted almost beyond recognition.

Id.

id., at 543, the Court proceeded to fill out the "vague contours of the Due Process Clause," *Rochin* v. *California*, 342 U.S. 165, 170 (1952),* mindful that its judgment could not be rooted in "personal and private notions," and that it must exercise its judgment "upon interests of society pushing in opposite directions." *Id.*, at 171.**

The constitutional terrain described in *Roe* v. *Wade* is an area in which the Court, in a series of decisions, long ago marked out a "zone of privacy created by several fundamental constitutional guarantees," *Griswold* v. *Connecticut*, 381 U.S. at 485, in matters relating to child rearing, mar-

* Though confessing that the words of the Due Process Clause "do not interpret themselves," S.G. at 24, and that the provision does not merely prohibit the government from "actually taking hold of a person, as to confine him, without fair procedures," S.G. at 25, the Solicitor General would limit the meaning of liberty to those protections expressly guaranteed by the Bill of Rights. This view of the Due Process Clause, fully accepted by only one member of the Court, *see Griswold* v. *Connecticut*, 381 U.S. at 507-27 (Black, J., dissenting), was rejected even by the Justices dissenting in *Roe* v. *Wade*. *See Griswold* v. *Connecticut*, 381 U.S. at 502-07 (White, J., concurring); *Roe* v. *Wade*, 410 U.S. at 172-73 (Rehnquist, J., dissenting).

** It is neither illogical nor "demoralizing," S.G. at 25, that the Court, at the same time it has refrained from invalidating legislation aimed at curing social evils arising out of industrial life, *e.g. West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), has shown special solicitude for *personal* freedom "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). This responds to an observable distinction between state intrusions upon such "economic freedoms" as the ability to pay substandard wages and state intrusions into time-honored, intimate relationships and decisions. Thus, it has long been recognized that "in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

riage and procreation.* A repudiation of the principles announced in *Roe* v. *Wade* would therefore also remove the constitutional girders of some of this Court's most important decisions in this century.

In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), for example, the Court struck down under the Due Process Clause a statute that prohibited the teaching of foreign languages to children. It found that the state had intruded into a protected liberty interest because the legislation "materially . . . interfere[d] . . . with the power of parents to control the education of their own." *Id.* at 401. In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated a state law requiring parents to send children to public, rather than parochial, school because the legislation "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control." *Id.* at 534-35. These decisions recognized that the Due Process Clause protects a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158,

* As this Court stated in *Roe* v. *Wade*, 410 U.S. at 152:

> In a line of decisions . . . going back perhaps as far a *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968); *Katz* v. *United States*, 389 U.S. 347, 350 (1967); *Boyd* v. *United States*, 116 U.S. 616 (1886); *see Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment; *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

166 (1944);* *Poe* v. *Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

So, too, has the Court scrutinized and invalidated state legislation encroaching on the ability of citizens to marry. *Loving* v. *Virginia*, 388 U.S. 1 (1967). In *Loving*, the Court reversed convictions under a statute that made inter-racial marriage a criminal offense. While the Court held that the statute was invalid because it violated the "central meaning of the Equal Protection Clause," *id.* at 12, the Court relied equally on the Due Process Clause when it held the statute invalid, finding that it deprived persons of the freedom to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* *See Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978).

In *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), the Court struck down a state statute authorizing the sterilization of repeated felons, characterizing the ability to procreate as "one of the basic civil rights of man." *Id.*, 316 U.S. at 541.** In *Griswold*, the Court recognized that, just as the state cannot terminate the right to bear children, it cannot invade marital relationships to require couples to bear children by

* Contrary to the view of the Solicitor General, S.G. at 29, the state regulation under review in *Prince* involved not only restriction on freedom of religion, but, as the Court observed, encroachment on the separate and distinct "rights of parenthood." 321 U.S. at 166.

** *Skinner* cannot be characterized as only an equal protection case. It is an axiom of equal protection analysis that a statutory classification will not be subjected to the searching scrutiny applied in *Skinner* unless the classification is "invidious" or impinges on a fundamental right. *Plyer* v. *Doe*, 457 U.S. 202 (1982). The Court recognized that the classification of different crimes selected by the state in *Skinner* raised "no substantial federal question." 316 U.S. at 540. Rather, it was because the statute derived certain felons, not rationally distinguishable from others, of a "basic liberty" that it was held invalid.

denying them the use of contraceptives. 381 U.S. at 479-80. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), recognized that the right of privacy guaranteeing the freedom to use contraceptives as a means to control if and when to bear children inheres not only in the marital relationship:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child or beget a child. *See Stanley* v. *Georgia*, 394 U.S. 557 (1969). *See also Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29 (1905).

405 U.S. at 453-54 (footnote omitted).

Thus, prior to *Roe* v. *Wade*, the Court had determined that unwarranted intrusions by the state into personal decisions about whom to marry, how to raise and educate children, and when or whether to bear children were proscribed by the guarantee of the Fourteenth Amendment: "nor shall any State deprive any person . . . of liberty . . . without due process of law."

Viewed in this context, it is plain that the Court did not "leap to its conclusion," S.G. at 27, that the right of a woman to choose whether to terminate her pregnancy was encompassed within the right of privacy guaranteed by the Due Process Clause. Rather, the Court carefully considered the rational involved in the cases preceding *Roe* and other factors before it reached its conclusion that the Fourteenth Amendment restricts state action that forbids abortion. *Roe* v. *Wade*, 410 U.S. at 153.

This Court has shown unwavering adherence to its historical reading of the right of privacy in the cases involving abortion since *Roe* v. *Wade*, as well as in matters bearing on conception and family relationships. *E.g., Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (invalidating state laws burdening the right to marry); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on distribution and advertisement of contraceptives); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning law that interfered with decisions as to family composition); *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) (invalidating an employment rule burdening the woman's decision to bear a child). Because *Roe* v. *Wade* falls squarely within the historical and rational traditions of this Court in elaborating the meaning of the Due Process Clause under which liberty is a "continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints," *Poe* v. *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting), *stare decisis* and the fundamental principles of adjudication of constitutional rights require its reaffirmance in the cases now before this Court.*

---

* For the reasons set forth in the opinions of the Third and Seventh Circuits, this Court should affirm the *Thornburgh* and *Diamond* judgments.

Conclusion

For the foregoing reasons, the arguments of the Department of Justice should be rejected, the principles of *Roe* v. *Wade* reaffirmed, and the judgments of the courts below affirmed.

Dated: New York, New York
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, *et al.*,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,

Appellees.

EUGENE F. DIAMOND, *et al.*,

Appellants,

v.

ALLAN G. CHARLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS, THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, AND THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION

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INTEREST OF AMICI[1]

THE CENTER FOR CONSTITUTIONAL RIGHTS ("CCR") is a non-profit litigation and educational organization. Founded in 1966 to provide legal support in the Southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full reproductive rights for all women has been a priority for CCR.

THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE ("CARASA") is a New York City-based organization of several hundred women and men dedicated to protecting and furthering women's ability to make choices about their reproductive health and lives, free

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[1]Letters indicating the consent of counsel for all parties to the filing of this brief have been filed with the Clerk of this Court.

from legal, social, and economic constraints. Founded in 1977, in response to the elimination of Medicaid funding for abortion, CARASA has long fought for access to abortion for all women, regardless of income or age, and for an end to coercive sterilization practices. It has also long fought for the availability of social and economic supports--such as child care, adequate wages or public assistance, and affordable housing--so that women who wish to have children can raise them in a safe and healthy environment.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("NECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights, particularly for the poor and the powerless. Founded in 1951, the organization has worked to achieve its

goals through litigation and public education. The NECLC is committed to ensuring reproductive freedom for of all women and men.

THE NATIONAL LAWYERS GUILD ("NLG") is an organization of nearly 8,000 lawyers, legal workers, law teachers, and law students. Since its inception in 1937, the NLG has consistently worked on behalf of groups seeking social justice. Many of its members advise and represent women affected by laws which attempt to restrict freedom of choice. The NLG is particularly concerned that allowing the anti-abortion statutes at issue in this case to stand will effectively eliminate options currently available to women and their doctors, forcing women to continue unwanted pregnancies despite the risks they will incur.

THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION is a non-profit organization supporting programs of detection, prevention and research into Tay-Sachs and similar genetic diseases occurring in infants and children. Children afflicted with Tay-Sachs disease, or one of the similar allied diseases, suffer severe mental and physical impairment, resulting in their deaths in infancy or very early childhood. The slow degeneration and eventual death of a child with one of these diseases has devastating and permanent effects on the child's parents and entire family. To help parents through this most difficult time, National Tay-Sachs sponsors a nationwide parent-peer communications network, which allows parents of affected children to obtain the emotional support they can only receive

from other parents of children with the same or similar diseases.

The National Tay-Sachs and Allied Diseases Association, established in 1958, has a membership of approximately 3,000 families. The organization's main purpose is to provide the medical and lay communities with information about the diseases' medical and social implications and the existence of a safe preventative screening measures.

At the close of 1984, approximately 500,000 young adults were screened for Tay-Sachs. Nearly 20,000 carriers have been identified, and over 1,300 pregnancies have been monitored by amniocentesis and chorionic villi sampling (CVS). As of June, 1984, 259 fetuses with Tay-Sachs disease were identified. The other monitored pregnancies resulted in over 1,000 babies being born free of Tay-Sachs disease.

The National Tay-Sachs and Allied Diseases Association firmly supports parents' choice to have children free of debilitating and/or terminal diseases.

SUMMARY OF ARGUMENT

Both Illinois and Pennsylvania attempt to circumvent the clear command of Roe v. Wade and, by prescribing post-viability abortion procedures which diminish women's physical health needs and ignore their mental and emotional health, prohibit such abortions altogether.

Both statutes exalt the state's interest in the potential life of the fetus over the actual lives of women seeking to terminate their pregnancies. Both statutes, in design and effect, impermissibly demean a woman's moral and intellectual decision-making role in the very rare case of post-viability abortion.

The cumulative effect of these statutes is to discourage women from choosing abortion after viability and punish those women who are not deterred. Even for women determined to exercise their constitutional rights, the statutes create a climate of fear and uncertainty within the medical profession which will deter doctors from providing such abortions and achieve the unconstitutional goal not by prohibiting of abortion after viability in haec verba, but by ensuring that the medical community does not make them available to women.

INTRODUCTORY STATEMENT

Reproductive autonomy is at the core of personal freedom. Without it, guarantees of equality are illusory. Women who cannot control when and how many children they will bring into this world cannot participate as free and equal

people in family, social, political, and economic life.

Cognizant of the importance to women of the right to choose abortion, this Court has, for more than a decade, held "that the right of privacy grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 (1983), citing Roe v. Wade, 410 U.S. 113 (1973). In so doing, the Court recognized that the right to choose abortion, like the right not to be subjected to involuntary sterilization, Skinner v. Oklahoma, 316 U.S. 535 (1942), is a fundamental aspect of the basic civil right to reproductive autonomy. Since Roe v. Wade, this Court has repeatedly upheld the right to abortion in the face of numerous legislative attempts to

subvert it. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976);Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979). Only two years ago, this Court, in Akron, firmly rejected the suggestion that these cases were wrongly decided and explicitly reaffirmed Roe v. Wade.

Nevertheless, this Court is again being asked both to abandon principles of stare decisis and to deny women the fundamental right of reproductive autonomy that it has enunciated and protected for more than a decade. The Solicitor General argues that this Court should not respect the right to choose abortion because neither the text of the Fourteenth Amendment nor its history explicitly mentions abortion. Brief for the United States as Amicus Curiae in Support of Appellants at 23-30. It is absurd to

contend that, because the drafters of the Fourteenth Amendment were not specifically occupied with the question of abortion, this Court cannot now guarantee the right of procreative choice.

Akron made clear that "the history of this Court's constitutional adjudication leaves no doubt that 'the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the specific guarantees elsewhere provided in the Constitution.'" 462 U.S. at 426-27, quoting Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting). The absence of conclusive evidence of the Amendment's intended effect on access to an important civil right should not determine the outcome here any more than it did in Brown v. Board of Education, 347 U.S. 483 (1954). In this case, as in Brown, "we cannot

turn the clock back to 1868 when the Amendment was adopted." Id. at 492.

It is not surprising that the right to abortion was not addressed in 1868. As the Roe Court was well aware, abortion was a legally permitted option for women well into the 19th century, 410 U.S. at 141, and, as historians tell us, it was an accepted practice well after restrictive legislation was enacted.[2] Focusing instead on the problems brought about by

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[2] See, e.g., The Human Life Bill: Hearings before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, on S. 157, A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception, 97th Congress, 1st Sess. 437-38. (Statement of Dr. Carl Degler, Margaret Byrne Professor of American History, Stanford University). One important reason why anti-abortion measures enacted in the 1860's and 1870's failed to alter official practice was the continuing tolerance of the practice shown by state and local courts in abortion cases. The shift in judicial attitude toward abortion did not begin until the 1880's. J. Mohr, Abortion in America 230 (1978).

the recently concluded Civil War, the framers of the Fourteenth Amendment concentrated on the overriding national issue of guaranteeing rights to the newly emancipated slaves. Thus, for many groups and for women in particular, the war-time Amendments were initially of little assistance in their struggle for basic civil rights. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1873).

Developments in law and society, however, have poured additional meaning into the broad guarantees of the Fourteenth Amendment. Accordingly, in recent years, the Court has repeatedly held that the Fourteenth Amendment guarantees women an opportunity to participate fully in society, no longer relegating them to the domestic sphere of childbearing and

childrearing, see e.g., Reed v. Reed, 404 U.S. 71 (1971) Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), just as it now affords both women and men reproductive autonomy.

The recognition of the abortion right evolved out of a steady and growing acceptance of a right of personal privacy extending to family matters including childrearing, procreation, and marriage. See e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S.438 (1972).[3]

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[3]As this Court recognized in Roe,
(Footnote Continued)

The right to abortion also has close connections with the values embodied in the Thirteenth Amendment, which prohibits all slavery and involuntary servitude, "irrespective of the manner or authority by which it is created." Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 430 (1905). "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons..." Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 146, 151 (1911). By forbidding coerced service, it guarantees to all people the right to consent to labor.

(Footnote Continued)
the right to abortion is also closely connected to the common law immunity given to control of one's body. Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891). 410 U.S. at 152. This common law right was given constitutional significance in Terry v. Ohio, 392 U.S. 1 (1968).

Pregnancy and the labor of childbirth are work of the most intimate continuous kind. Pregnancy and childbirth involve vast physical changes in a woman's body and potentially severe pain and discomfort. They involve degrees of risk to life and health from the very serious to the relatively minor. Women undertake voluntary pregnancies cognizant of these risks and burdens. When chosen, when a child is desired, pregnancy may be hard but nonetheless a labor of love. When forced, pregnancy is an intolerable, dehumanizing form of servitude. The right to choose abortion, because it is essential to guarantee women's consent to this labor, is deeply rooted in the core value of the Thirteenth Amendment.

The abortion right, then, is tied both to the Fourteenth Amendment's concept of personal liberty and the Thirteenth Amendment's charter of freedom

from the degradation of forced labor. So rooted, so crucial to women, and so recently reaffirmed, it is a right that must again be respected.

I. BOTH ILLINOIS AND PENNSYLVANIA IMPERMISSIBLY ELEVATE THE STATE INTEREST IN THE POTENTIAL LIFE OF THE FETUS ABOVE WOMEN'S RIGHTS TO LIFE, HEALTH AND PRIVACY IN AN ATTEMPT TO DETER AND PUNISH ABORTIONS LATE IN PREGNANCY

The Illinois and Pennsylvania statutes before the Court on these appeals contain a variety of unconstitutional provisions restricting abortion. Of particular concern to amici are those which sacrifice women's health--physical and emotional--to the purportedly viable fetus.[4] These are the latest in a long

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[4] Amici, although limiting this brief to the viability-related issues, urge affirmance of the judgments of the Courts of Appeals for the Third and Seventh Circuits striking down all Pennsylvania
(Footnote Continued)

line of local laws which attempt to distort this Court's holding in Roe v. Wade that a state's compelling interest in the potential life of the viable fetus can justify laws restricting abortion only if those laws do not jeopardize women's lives or health.

The Pennsylvania Abortion Control Act mandates that doctors terminating pregnancies after viability employ the abortion procedure most likely to result in a live birth urless such procedure "present[s] a significantly greater medical risk" to the woman. Pennsylvania explicitly excludes "the psychological or emotional impact on the mother of the unborn child's survival" from the comparative risk determination. 19 Pa. Cons. Stat. Ann. 3210(b) (Purdon 1983).

(Footnote Continued)
and Illinois provisions burdening the right to choose abortion.

The Illinois statutory scheme permits no consideration of women's life or health in selecting the procedure for post-viability abortions. Ill. Rev. Stat. ch. 38 ¶¶81-26(1),(4) (1983).[5] A physician is excused from a primary duty to preserve fetal life if it "would increase medical risk" to the woman only after the procedure is underway. Id. ¶81-26(5).

These provisions affect very few abortions--less than one percent of all abortions performed.[6] These few late

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[5]Section 6(1) of the Illinois statute appears to unconstitutionally proscribe all post-viability abortions. See Point II,A, infra.

[6]Ninety-nine percent of abortions in 1981 were performed at 20 or fewer weeks gestation (LMP), Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 264 (1984); Based on 1980 data, it has been suggested that only about 0.01% of all abortions are performed at more than 24 weeks' (Footnote Continued)

abortions are necessarily late, chosen as they are for reasons which do not arise or are not apparent until later in pregnancy, and the need for them is grave. The statutes at issue here presume that, in this small but significant number of cases, women together with their physicians are incapable of appropriate decision-making.

A. Abortions At or After Viability Are Requested and Performed for Compelling Physical and/or Mental Health Reasons.

A variety of circumstances compel women to choose abortion late in

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(Footnote Continued)
gestation. Henshaw, Binkin, Blaine, Smith, A Portrait of American Women Who Obtain Abortions, 17 Family Planning Perspectives 90, 91 (1985). As shown infra Point II,C, a substantial proportion of this small number of late abortions are performed on women carrying non-viable fetuses. Fetal survival at less than 24 weeks gestation and 600 grams has not been reliably documented. Id.

pregnancy. One circumstance, noted by the Court in Colautti, is the discovery of severe, even fatal, fetal defects. The safest current method of detecting genetic defects is amniocentesis, a test which must be performed well into the second trimester of pregnancy, with results seldom being available before the 19th week of pregnancy.

Were it not for such option of late abortion, many women would choose to abort healthy pregnancies early, for fear that the fetus would be severely defective. Only the possibility of late abortions permits these women to have healthy, wanted children.[7]

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[7]The overwhelming majority of tests for fetal abnormalities are negative, allowing the woman to continue the pregnancy without that anxiety. Simpson and Verp, Prenatal Diagnosis of Genetic Disorders, Principles of Obstetrics, 130-32 (R. Caplan ed. 1982); Caplan, (Footnote Continued)

The problems of giving birth to a child with a severe genetic defect are many and profound. The mother of a child with Tay-Sachs disease put it succinctly: "Once you've had a child with Tay-Sachs, you can't bring another into the world." "Breakthroughs in Prenatal Testing Give Hope to High-Risk Couples," Wall Street Journal, July 22, 1985, p. 21. For a moving account of the tragedy of Tay-Sachs, see, M. Silver, "Life After Tay Sachs," 99 Jewish Monthly, A Publication of B'nai B'rith, No. 10, pp. 14 et seq. (June-July, 1985).

(Footnote Continued)
Antenatal Care, Principles of Obstetrics, 104 (R. Caplan ed. 1982). This testing process has been estimated to result in abortions in only two to five per cent of the 75,000 or so cases of diagnostic amniocentesis annually. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 261 (1984). This is a tiny percentage of all abortions, but it is a critical one.

One study of parents of children with cystic fibrosis reveals the parents' perceptions.

> ...one mother, who had lost a first-born son, said: 'I often wish he hadn't been born -- for he didn't ask to be born, and if I'd known or thought we would pass on this disease, he'd never have been born.' One mother, who said she had not been told the disease was inherited until she had lost three children, commented: 'If I had known I wouldn't have had any more. It does make me feel guilty having so many. I think it's because they've suffered -- they definitely must suffer having their lungs affected.'

L. Burton, The Family Life of Sick Children 213 (1975).

These problems have a devastating effect on the woman and her family. A woman may not have the psychological or financial resources or the physical energy to cope with a severely damaged child. She may already be caring for other children or a disabled family member. If she gives birth to a child with a birth or congenital defect who requires

constant care, she will be forced to concentrate her energies on the care of the newborn to the detriment of other children or family members, or to give up financially vital employment. Thus, women's health often necessitates an abortion in these tragic circumstances.

Other circumstances requiring late abortions include the sudden or suddenly critical illness of the woman later in pregnancy. Conditions such as pre-eclampsia, diabetes, heart disease, cancer, high blood pressure and kidney disease, either arise or worsen later in pregnancy and necessitate abortions at or after viability--often on an emergency basis.[8] Further, young and poor women,

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[8] See generally, F. Arias, ed., High-Risk Pregnancy and Delivery (1984); See also, Knight and Arias, Third Trimester Bleeding, Id. at 287; Arias, Hypertension During Pregnancy, Id. at 100.

who do not have ready access to health care, delay obtaining abortions necessary to preserve their lives and health because they are unaware of their availability or unable to raise the funds necessary to secure them. The very young and the very poor are the women to whom pregnancy presents the greatest health risk.[9]

When the need for abortion does not arise or become known until late in pregnancy, time is needed to make the decision and, if the decision is to abort, the relative unavailability of

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[9]In 1981, more than one third of all post-first-trimester abortions were obtained by women under the age of 20. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 262 (1984); Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Won't Go Away (1981); Singh, Torres, and Forrest, "The Need For Pre-Natal Care in the U.S.: Evidence From The 1980 Natality Survey," 17 Family Planning Perspectives 118 (1985).

late abortion procedures results in additional delay.[10] In extreme cases, these women may be at the brink of viability when they are finally able to obtain abortions.

If a woman decides to continue a life or health-threatening pregnancy, she cannot be told that the state has concluded that it is not worth the risk. Similarly, a woman who opts for abortion cannot be forced by the state to risk a birth.

B. The Statutory Schemes Compel Disastrous Outcomes.

Both statutes also preclude consideration of the terrible suffering that

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[10]Only a miniscule percent of all abortion providers offer procedures late in pregnancy and it is difficult and time-consuming to locate an appropriate facility. Alan Guttmacher Institute, Public Policy Issue in Brief, February 1983, at 3.

accompanies attempts to produce live births. The statutory language gives the impression that living, healthy infants will be produced. In fact, that result is unlikely. Virtually all of the very few infants born alive from the statutorily mandated procedures would be of extremely low birth weight (1000 grams or less).[11] One recent study showed that fewer than half of all such babies survived to leave the hospital. Most of the deaths occurred within the first month. The lower the birth weight, the worse the chances for survival: more than

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[11] The measurements of development in utero and after birth differ, and are not simple to reconcile. Gestational age is the crucial measure in utero; weight is more widely used after birth. Moreover, "the most important information that an obstetrician requires prior to the interruption of a compromised pregnancy is the status of the fetal lung..." Hobbing, A technical approach to uncertain dates, Perinatal Intensive Care 123, 126 (S. Aladjem and A. Brown eds. 1977).

97% of the infants 501-600 grams died; about 70% of those of 601-700 grams and almost 30% of those of 901-1000 grams died. Saigal, Rosenbaum, Stoskopf, Sinclair, Outcome in infants 501 to 1000 gm birth weight delivered to residents of the McMaster Health Region, 105 J. Pediatrics 969, 974 (1984). Of the infants who had survived through the study period, about half had handicapping conditions the researchers classified as either "major" or "moderate." Id. See also Hirata, Epcar, Walsh, Mednick, Harris, McGinnis, Sehring, Papedo, Survival and outcome of infants 501 to 750 gm: A six-year experience, 102 J. Pediatrics 741 (1983) (60% of such infants in newborn intensive care units died; of the survivors, all were below fiftieth percentile in growth by age 3; one-third were of borderline or lower

intelligence by age 4; 8% died after discharge from hospital).

These outcomes, and the measures required to attain even them, are far from costless for the mother. The anxiety, alienation, disruption to the family and grief of having an infant die or spend months in intensive care (and then probably die) are staggering. See Stinson, The Long Dying of Baby Andrew (1983); Siegel, Gardner, Merenstein, Families in crisis: theoretical and practical considerations in Handbook of Neonatal Intensive Care 421 (G. Merenstein and S. Gardner eds. 1985); Gardner and Merenstein, Grief and Perinatal Loss in id 449. So are the financial costs. Moreover, years of special care are likely to be required if the child survives.

A woman may, of course, freely choose to take these risks.[12] When she has considered and decided not to take them, however, the state is not permitted to override her choice in practice, while appearing to honor it in theory.

The suffering is not obviated by the possibility that a woman may put up her "aborted alive" child for adoption. Many children in that situation will be considered too much at risk to be adoptable. See Stinson, supra. The woman's life will in any event have been drastically changed by the pregnancy and birth. The problems of giving up a child for adoption are particularly acute for

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[12] Women who want to carry to term fetuses with severe defects or life-threatening conditions and rear their disabled children are entitled to the resources and societal support necessary to assure the best possible life prospects.

women because they bear a disproportionate burden of responsibility for children, as well as all the stress of childbirth. Among the psychological burdens of forced childbearing followed by adoption is debilitating anguish over having abdicated responsibility for a child, regardless of the woman's actual ability to fulfill such responsibility had she kept the child. Furthermore, familial and social ostracism may result if the relinquishment is perceived as an abandonment of the child. See, e.g., B. Lifton, Lost and Found: The Adoption Experience 207-27 (1979); Regan, Rewriting Roe v. Wade, 77 Mich L. Rev. 1569, 1589 (1979); Kilibanoff, Genealogical Information in Adoption, 11 Family Law Quarterly 185, 195 (1977).[13]

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[13] In a study of thirty-eight birth parents who have given up children to adoption between one and thirty-three years before the survey, it was found that "[e]ven if the birth parents had become comfortable with the decision because there were no viable alternatives they nevertheless felt loss, pain, mourning, and a continuing sense of caring for that long vanished child." A. Sorosky, A. Baran, & R. Pannor, The Adoption Triangle 72 (1978). The authors liken relinquishment to a psychological amputation," and present the letters of birth parents expressing their inability to resolve their feelings or forget the children they gave up. Id. at 47-72.

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C. The Statutes Disregard Women's Health.

The statutory language attempts to create an illusion of fairness by balancing "the life and health of any unborn child" against "the life or health of the pregnant woman." Roe makes clear, however, that the life and health of a pregnant woman outweigh the state's interest in the potential life of the viable fetus. Moreover, the statute in fact impermissibly weights the balance in favor of the state's protection of fetal

potential. The provision applies only to physical health, without any extraneous female "emotional" factors.[14] Far from being a humane accommodation between competing interests, it reduces a woman to mere physicality. The prohibition on consideration of mental health says that a woman is only a maternal machine that is entitled to be saved from gross

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[14]Indeed, by requiring women to bear "significantly greater medical risk," the Pennsylvania statute even requires women to sacrifice their physical health and possibly their lives in the service of a viable fetus. This demand is clearly foreclosed by this Court's precedents. Roe identified the State's compelling interest in the potential life of the fetus at viability, but made clear that its force stopped at the point of "the life or health of the mother." 410 U.S. at 163-64. The Court of Appeals held that the State can not force doctors to weigh the degree of increased danger to a woman's health against a possible benefit to a viable fetus. A.C.O.G. v. Thornburgh, 737 F.2d at 283, 300 (1984), citing Colautti v. Franklin, 439 U.S. at 400. Any increased danger to the woman overrides the State's interest in fetal potential.

physical damage; she is not a person whose life and future matter.

The artificial definition of "health" is unconstitutionally restrictive. This Court has long recognized that "health" is a complex of factors, "physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient." Doe v. Bolton, 410 U.S. at 192. See also United States v. Vuitch, 402 U.S. 62, 72 (1971). Such an attempt to legislate women's psychological well-being out of existence violates the constitutional mandate of Roe and Doe.

These statutes are unlike the requirement upheld in Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), that a second doctor attend post-viability abortions. The Missouri provision at issue in Ashcroft protected a baby--a person--

born alive after an abortion procedure. It did not compel an abortion method designed to trigger the need for a second doctor.[15] Here, the states assert their interest in the potential life of a fetus still in utero and seek to compel its actualization with little, if any, regard for the health of the pregnant woman.[16]

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[15]Another provision in the Missouri statute, not before the Court in Ashcroft, did forbid "the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman." 462 U.S. at 483. However, that provision did not, unlike the statutes before the Court on this appeal, constrict the definition of health or prevent a woman, in consultation with her physician, from basing her choice of post-viability procedure on all the aspects of her health recognized in Doe v. Bolton. See Planned Parenthood Asso. of Kansas City v. Ashcroft, 655 F.2d 848, 862-63 (8th Cir. 1981).

[16]In Ashcroft, Justice Powell, reviewing the testimony of a single abortion provider, noted that the record in that case lacked an explanation of "the circumstances when there were

(Footnote Continued)

The solicitude for fetal potential, as expressed in these provisions, exceeds a state's constitutional powers and invades women's constitutional rights. The statutes turn Roe on its head, preferring the potentiality of fetal life to the reality of women's lives, and refusing to recognize women as "persons in the whole sense." 410 U.S. at 162.

D. The Statutes Cruelly Punish Women Who Choose Abortion.

Inherent on the face of the Pennsylvania statute and in the Illinois scheme, is a wholly false distinction

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(Footnote Continued)
'contraindications' against the use of any of the procedures that could preserve viability. . ." 462 U.S. at 483-85, n. 7. The question, however, is not one of provider preference. It is a grave matter of women's total health needs--including mental health, emotional and familial considerations. After all, it is the woman, in consultation with her physician, who makes the choice of procedure, not the physician alone based on his or her convenience or personal views.

between the "psychological and emotional impact . . . of the unborn child's survival" and the mental health reasons for which a woman sought the abortion in the first place. This Court in Roe recognized the importance of the woman's health by limiting the state's power to prohibit post-viability abortions to those cases not jeopardizing women's health. The Pennsylvania statute purports to adhere to Roe by incorporating preservation of the woman's life or health as a reason for abortion in §3210(a). Yet it completely undercuts women's health in §3210(b), which says that, although the health impact of bearing a child can be the basis for an abortion, the state can force a woman to live with exactly the detrimental consequences the abortion was supposed to forestall. This is as cruel as it is absurd.

In addition, the process of forced birth and subsequent surrender have further consequences. A woman, having given birth to a child, must go through the rest of her life with the child's well-being as an unanswered and unanswerable question. Is the child with a loving family? Has the child been left, neglected, in an inferior institution? Has the child received a proper education? In our society, giving birth means having a host of social and emotional connections to the child, even if the birth was unwanted and coerced. These statutes foist those connections, and the difficulty and pain of dealing with them, on women who have considered and rejected them.

Nor would the unconstitutional impact of the statutes be ameliorated in the event that techniques ever improved sufficiently to save almost all extremely

low birth weight infants and afford them a reasonably good prognosis.[17] The state's command to women to produce babies can not be reconciled with the fundamental rights of autonomy and bodily integrity that are part of the constitutional guarantee of privacy. These statutes represent a state choice for reproductive compulsion, a choice can not be made consistent with our Constitution. Cf. A. Huxley, Brave New World (1939).

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[17]The time required for the development of the human lung sets a lower limit on the possibilities of neonatal survival. See experts quoted in Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1024 (1984). See also n. 11, supra.

E. The Statutes Inhibit and Deter Women From Making Reproductive Choices.

These provisions have indirect effects that are as pernicious, and unconstitutional, as their direct effects. By mandating the use of abortion methods that could result in a live birth, the state forces a woman to run the risk of giving birth, very prematurely, to a child who has little chance for a healthy life--when what she has decided on is an abortion, not a birth. Faced with this state-imposed risk, women may very well "choose" to forego the abortion. They will opt to carry their pregnancies as close to term as their health will permit. A woman compelled to have the child she would have chosen not to have may sacrifice her own life and health--and the well being of the rest of her family--to improve the quality of the life of the new child. Women do not want

their children to die, or lead painful and constricted lives. That is often why they choose abortion. If the state forces childbirth upon them when they would have chosen abortion, many women will act to assure the best possible outcome at birth. This Court should not mistake their humane reaction to a state compelled dilemma for a willing surrender of the right to an abortion.

Paradoxically, the statutes also deter women from choosing childbirth in many cases. By forcing women to face the prospect of live births of fetuses diagnosed to be fatally or severely defective, the statutes act to foreclose not only an option for abortion, but an option for birth. See Point I,A, supra. This Court has, since Skinner v. Oklahoma, made clear that the state can not interfere with the reproductive potential of individuals. Women for whom

amniocentesis holds the possibility of childbearing without fear of disaster should not be deprived by the states' rigidity about abortion of their opportunity to bear healthy children.

II. THE STATUTES UNCONSTITUTIONALLY RESTRICT WOMEN'S ACCESS TO ABORTION BY IMPERMISSIBLY RESTRICTING THE ABILITY OF DOCTORS TO EXERCISE THEIR MEDICAL JUDGMENT.

Although appellant-intervenor Diamond[18] characterizes the Illinois regulation of post-viability abortions at issue here as an innocuous effort that "merely regulates the manner in which the physician may perform a post-viable abortion," Brief for Appellants at 37, in reality, the statutes erect a genuine obstacle for women in the form of

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[18] Illinois has not appealed to this Court and Williams, the only other intervenor below, has since died.

criminal sanctions for their doctors. These restrictions have an obvious, direct effect on women, who will not be able to find doctors willing to take the risks imposed on them.

A. Requiring a Physician Performing an Abortion to Treat a Fetus as Though it Were Being Born Alive is Unconstitutional.

Section 6(1)[19] of the Illinois law purports to impose the same standard of

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19 No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a

(Footnote Continued)

care on a physician "who intentionally terminates a pregnancy" post-viability as on a physician attending a live birth. Read literally, this would seem to prohibit the abortion, since the only way to meet this standard of care is to terminate the pregnancy as though a live birth were the desired outcome. This involves a very different course of medical treatment than would be

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(Footnote Continued)
viable fetus or infant results from such a failure.

The Court of Appeals noted that, in June, 1984, §6(1) was "substantially transformed" by amendment. 749 F.2d at 455. Amici therefore suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. It is the current statute which governs the availability of abortions in Illinois. No woman could now be affected by the version of §6(1) considered by the Court of Appeals.

In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals on §6(1), amici urge affirmance for the reasons here.

undertaken if a live birth were not the outcome sought. For example, in the case of a woman exhibiting placenta previa with moderate bleeding, either an abortion or an attempt to continue the pregnancy could be indicated, depending on the circumstances. If a woman elected to continue the pregnancy, she could be hospitalized for weeks, then undergo a Cesarian section.[20] Knight and Arias, Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 285-87 (F. Arias ed. 1984).

If a woman elects to have an abortion, it should be performed immediately, not after an unnecessary and dangerous delay. Section 6(1) might well

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[20] For an account by parents of the agonizing death of a child born after doctors advised against an abortion in such a situation, see R. Stinson and P. Stinson, The Long Dying of Baby Andrew (1983).

require a woman whose health is threatened by continuation of the pregnancy to go to the brink of death before an abortion could be performed. Under Roe, as reaffirmed by Colautti, the health interest of the woman can not be disregarded until it has reached the point of being acutely life-threatening. The statute, therefore, is plainly invalid at this literal level.

Appellants, however, contend that §6(1) "requires that fetal protection measures be taken during the course of the abortion performed after viability." Brief for Appellants at 31. This reading makes the statute unconstitutionally vague. Since literal compliance is both medically and legally impossible, what is left is a statute requiring physicians to take "fetal protection measures." What are such measures? How heroically must they be pursued? At what

point will such measures impinge on the woman's health, and how will a physician know what to do then? In sum, it is completely unclear what the physician's duty of care could possibly be, or how it could be carried out.

Section 6(1) further imposes liability on doctors for conduct with respect to a fetus "known to be viable." The statute does not specify how or under what standards the knowledge is to be evaluated, or by whom. These are crucial omissions, rendering the statute unconstitutionally vague.

There is no consensus in the medical community about how great the chance for survival must be in order for a fetus to be considered viable.[21] There is also

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[21] Colautti at 388-89 quotes two physicians who gave different percentage figures and one who refused to use a (Footnote Continued)

disagreement as to what variables should be accorded greatest weight.[22] As this Court has recognized,

> [t]he prospect of such disagreement, in conjunction with a statute imposing strict . . . criminal liability for an erroneous determination of viability could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Colautti, 439 U.S. at 397.

Because the ascertainment of viability is dependent on many variables, viability determinations also may be

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(Footnote Continued)
fixed percentage. See also Roe, 410 U.S. at 159.

[22] Compare Williams Obstetrics 173 (J. Pritchard & E. MacDonald 16th ed. 1980), (favoring fetal age as the most reliable determinant of chance for survival ex utero) with Williams, et. al., Fetal Growth and Perinatal Viability in California, 59 Ob. Gyn. 624 (May 1982) (finding that birth weight plays a greater role than gestational age in predicting survivability).

inaccurate by as much as several weeks.[23] Even the most advanced instruments for assessing fetal age have a five-day margin of error, and this margin is greater if the woman does not undergo ultrasound between the eighth and twelfth weeks of pregnancy.[24] It is simply not possible to "know" objectively that a fetus is viable. The imposition of

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[23]Grimes, supra n. 9, at 260-61.

[24]Hohler, Multiple Ultrasound Measures of Fetus More Accurate, 18 Ob. Gyn. News 50 (May 15-31, 1983). Contrary to the assumption of the Illinois statute that viability is an empirically objective fact, the viability assessments of physicians are highly subjective ones, based largely on experience: "The choice of 26, 27, 28 or any other number of weeks as the point of medical viability by experts in the field is based on experience from observing thousands of premature births and the correlation of survivals with estimated fetal age." Lenow, The Fetus as Patient: Emerging Rights as a Person, 9 Amer. J. Law & Medicine 1 (1983); see also, Bolognese and Roberts, Amniotic Fluid, in Perinatal Medicine: Management of the High Risk Fetus and Neonate 198-203 (2d ed. 1982).

criminal penalties on physicians on the basis of a presumed knowledge that is not possible to obtain and inadequate standards is clearly unconstitutional.

The central problem of lack of accepted objective standards is exacerbated by the statute's failure to specify who makes the determination that the fetus at issue is viable. This opens the physician to possible second-guessing by state law enforcement personnel or other medical personnel. That prospect is what has led this Court to hold repeatedly that "[t]he determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician." Planned Parenthood v. Danforth, 428 U.S. at 64, cited in Charles v. Daley, 749 F.2d at 459. See also Colautti v. Franklin, 439 U.S. at 396-97. The statute unconstitutionally leaves the physician in doubt on this

crucial point.

B. Pennsylvania's Attempt to Create a Balance Between Fetal Viability and Risk to Women is Unconstitutionally Vague.

Section 3210(b) of the Pennsylvania statute requires physicians to choose a post-viability abortion method "which would provide the best opportunity for the unborn child to be aborted alive" unless the use of that method would pose a "significantly greater" risk to the woman. This section is impermissibly vague because it forces physicians to combine their estimate of viability and their estimate of "significantly greater" risk to women, then attempt to balance them, and threatens criminal penalties if they strike a balance that the State does not like. As noted in Section II.A, supra, viability is itself an estimate. Colautti, 439 U.S. at 395-96. Viability estimates vary widely from case to case

and from physician to physician. Colautti, 439 U.S. at 396, and n. 14.

Compounding the uncertainty inherent in the viability determination is the requirement that physicians assess the significance of the increased risk to the woman. In what respect must a risk be "significantly greater?" Physicians are then required to compare their estimates of the magnitude of benefit to the fetus with their estimates of the magnitude of harm to the woman. This Court's conclusion about an earlier attempt by Pennslyvania in this area is equally applicable to §3210(b): "The State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." Colautti, 439 U.S. at 401.

C. Reporting Requirements That Focus on a Physician's Determination of Viability Endanger Women and Unconstitutionally Chill Physicians

Section 3211 of the Pennsylvania statute requires a physician to

> determine whether, in his good faith judgment, the child is viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

The Court of Appeals held that this requirement was unduly burdensome and furthered no compelling interest at the pre-viability stages. 737 F.2d at 301. Moreover, the requirement of reporting the basis for determining that "a child is not viable" creates an unnecessary and unconstitutional pressure on doctors.

The very language of the provision tells physicians that the state sees the fetus as a person ("a child"), contrary

to medical reality and the mandate of Roe. This attitude can only lead physicians to err on the side of the fetus in exercising their professional judgment, to the detriment of the woman and her rights.

The reporting requirements further impermissibly introduce the possibility of conflict between physicians' reporting duties and their medical judgment and responsibility to their patients. Deciding whether a fetus is viable in a marginal case is not, however, a simple or rapid process.[25] In some circumstances of urgent medical necessity, termination of pregnancy must be undertaken almost as soon as the

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[25] Experts recommend both ultrasound and amniocentesis. Knight and Arias Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 287 (F. Arias ed. 1984).

precipitating medical condition has been discovered.[26]

The reporting requirement compounds the disruption of the physician's judgment and practice begun by the viability focus of §3210(b). Should the physician take the time to make a full-scale viability determination that will satisfy the unknown persons who will later read the report at leisure? Even wondering about what to do can take valuable time in an emergency. The lack of direction to the physician about how to comply with this section, as well as the absence of an emergency exception to the requirements, render these provisions invalid.

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[26] E.g., placenta previa with severe hemorrhage, severe preeclampsia, carcinoma of the cervix. See n. 8, supra.

Under both the Illinois and the Pennsylvania statutory schemes, the fear of incurring criminal liability will induce doctors to err on the side of finding viability whenever the slightest chance of inaccuracy exists and to refuse to perform needed abortions. Because of the uncertainties inherent in determining viability, a large percentage of cases in which doctors are deterred from performing abortions will be of women carrying non-viable fetuses. The implementation of these statutes will undoubtedly result in the unconstitutional denial of abortions to women greatly in need of them.

D. The Statutes Straitjacket Doctors by Compelling Them to Convey Medically Inaccurate Information to Women Seeking Abortions.

Both the Illinois and Pennsylvania statutes require doctors to respond in a rigid, mechanical, and predetermined way when they attend patients seeking

abortions at or near viability. The statutes greatly circumscribe the exercise of physicians' medical judgment and distort the process of abortion care. By forcing doctors to inform their patients of an obligation to try to salvage the fetus, the statutes force them to perpetrate a cruel deception on pregnant women.

This is most pointedly the case with respect to Illinois §6(4),which has introduced an idea that can only be expressed as that of a "possibly viable" fetus.[27] This is simultaneously

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[27] No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of

(Footnote Continued)

redundant and confusing. Viability incorporates, by definition, a calculation of possibility.[28] A statutory scheme based on a possible possibility can not help physicians give women sound advice, especially since a pre-viable fetus will, by definition, die before or shortly after birth. Nor can it be a basis for criminal liability.[29]

(Footnote Continued)

the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support.

(emphasis added).

[28] Williams Obstetrics 587 (J. Pritchard & E. MacDonald, 16th ed. 1980) defines viability as a concept "widely used to identify a reasonable potential for subsequent survival if the fetus were to be removed from the uterus." (emphasis added).

[29] Illinois's perception of viability in §6(4) is so loose that it might even

(Footnote Continued)

In addition, Illinois §6(1) and Pennsylvania §3210(b), by creating criminal liability based on the physician's viability determination, distort the process of medical judgment. Even without the influence of the statutes, fetuses are wrongly deemed to be viable and die shortly after birth. The statutes, however, require physicians to act as though there are no marginal cases and

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(Footnote Continued)
justify an argument that the conceptus at any point is a "possibly viable" fetus, since in some sense it can survive for more than a moment outside the body of the woman, albeit with artificial support. Moreover, the phenomena of cloning, parthenogenesis and chimerism, demonstrate that the human zygote is not unique in its capacity to develop into an organisism. "If it is argued that a zygote should have the rights of personhood because it has the capacity to develop into a person, then one can also argue that an unfertilized egg should have the rights of personhood since it also may have the same capacity. Milby, The New Biology and the Question of Personhood: Implications for Abortion, 9 Amer. J.L. & Medicine 31, 32 (1983).

no countervailing factors: every fetus deemed viable must be treated in the same way, and every woman carrying such a fetus must be treated in the same way. This mandate denies to physicians the discretion and flexibility they need in order to make their best medical judgments in a difficult and sensitive area.

The statutes therefore require doctors to mislead their patients into believing that a reasonable possibility exists of giving birth to a baby able to sustain life, when, in fact, almost no possibility exists. In this way, not only do the statutes invade the privacy of the doctor-patient relationship, but they also actively encourage doctors to medically mislead pregnant women. This deception and the unnecessary grief it

will precipitate[30] cannot be overlooked in an evaluation of the statutes' unconstitutionality.

III. SECTION 6(4) OF THE ILLINOIS STATUTE IMPERMISSIBLY REGULATES ABORTIONS PRIOR TO VIABILITY IN CONTRAVENTION OF ROE v. WADE.

The Court in Roe declared, and in Colautti confirmed, the invulnerability of pre-viability abortions to state interference for any reason not related to maternal health. Roe, 410 U.S. at 154, 159, 169; Colautti, 439 U.S. at 682. Illinois, however, has tried to impose a requirement that doctors use the same standard of care in aborting a fetus which has a "possibility" of "more than momentary" survival[31] as in bringing to

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[30] See Point 1,B, supra.

[31] The statute has since been amended. The Court of Appeals did not
(Footnote Continued)

birth a truly viable fetus. This is plainly an impermissible regulation of pre-viability abortions. By its own terms, §6(4) identifies a period in pregnancy prior to viability. Because there is a parallel requirement in §6(1) which is addressed to fetuses deemed "viable," the legislature clearly intended the two sections to refer to different points in pregnancy. See Colautti v. Franklin, 439 U.S. at 393; Charles v. Daley, 749 F.2d at 460.

This intrusion into the period prior to viability is not justifiable. This Court has held that statutes purporting

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(Footnote Continued)
pass on the validity of the amended version. 749 F.2d at 452. Amici suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. See n. 19, supra. In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals about §6(4), amici urge affirmance for the reasons stated here.

to regulate abortions prior to viability, except on grounds of maternal health, unconstitutionally infringe upon a woman's fundamental right of privacy under the Fourteenth Amendment. Colautti v. Franklin, 439 U.S. 379, 388 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 63-64 (1976). Appellants concede, as they must, that Illinois' alleged interest in the fetus prior to viability is not compelling. Brief of Appellants at 38, 43. They offer no maternal health justification for the statute. The Court of Appeals correctly noted that §6(4) "does not seek to protect the health of the mother." 749 F.2d at 461. Therefore, it can not stand.

Although appellants attempt to salvage their position by suggesting that the pre-viability stages are subject to a "balancing" of interests (Jurisdictional Statement at 55), it is clear that the privacy right recognized in Roe would be meaningless if the right could be so abridged prior to viability. The "balance" appellants call for has already been struck. Roe v. Wade, 410 U.S. at 164-65.

CONCLUSION

The states' assertion of fetal primacy and their willingness to impose substantial and long-term hardships on women to implement that view goes well beyond constitutional bounds.

The judgments of the Court of Appeals for the Third Circuit and the Court of Appeals for the Seventh Circuit should be affirmed.

Dated: New York, N.Y.
August 30, 1985

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IN THE SUPREME COURT OF THE
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v.
AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS
v.
ALLAN G. CHARLES, ET AL.

ON APPEAL FROM
THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND SEVENTH CIRCUITS

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE -- WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES, CALIFORNIA; CALIFORNIA WOMEN LAWYERS; THE WOMEN'S BAR ASSOCIATION OF ILLINOIS; THE FLORIDA ASSOCIATION OF WOMEN LAWYERS; FLORIDA ASSOCIATION OF WOMEN LAWYERS, DADE COUNTY CHAPTER; AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS AND AMICUS BRIEF

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Women Lawyers' Association of Los Angeles, California; California Women Lawyers; the Women's Bar Association of Illinois; the Florida Association of Women Lawyers; The Florida Association of Women Lawyers, Dade County Chapter; and California Lawyers for Individual Freedom respectfully move this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for respondents and one of the appellants herein has been obtained, but the attorneys for the remaining appellant herein refused to consent to the filing of this brief.

Applicants have an interest in this case because they are organizations that have professional women

as members, that have women as clients, and that are concerned with protecting the constitutional rights of women in society. Applicants and their members are personally and professionally concerned with the importance of preserving a woman's right to decide whether to terminate a pregnancy because pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of unwanted children.

The attached brief responds to the arguments made by the Solicitor General of the United States in his amicus brief filed in support of respondents. Applicants believe

that the Solicitor General's arguments will not be adequately addressed by the respondents. If applicants' argument is approved by this Court, the decisions of the Appellate Courts below must be affirmed.

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INTEREST OF AMICI CURIAE

Amici curiae are state or local bar organizations having as members female and male lawyers and judges who are concerned with the special problems faced by women. California Lawyers for Individual Freedom is an organization of attorneys in the San Francisco area concerned with the preservation of personal liberties under the Constitution.

Amici and their members are personally and professionally concerned with the importance of preserving a woman's right to decide

whether to terminate a pregnancy because, as this Court found in Roe v. Wade, 410 U.S. 113, 153 (1973), pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of an unwanted child. Amici therefore submit this brief in response to the amicus curiae brief submitted by the Solicitor General of the United States.

SUMMARY OF ARGUMENT

The Solicitor General's argument that there is no fundamental constitutional right to choose whether to terminate a pregnancy is

untenable and unfounded. The doctrine of stare decisis requires reaffirmance of the holding in Roe v. Wade, which recognized that right. The right to choose to terminate a pregnancy is a fundamental right concerning a private decision about family matters that is clearly protected by the Due Process Clause of the Fourteenth Amendment. It is a well-established principle of constitutional law that any state regulation of such a fundamental right is subject to strict scrutiny and must be justified by a compelling state interest where the regulation impinges on the individual's right. In applying this test, the

state interest must be defined in a way that does not violate the Establishment Clause of the First Amendment. Finally, public policy and opinion support the Court's continued recognition of the constitutional right to reproductive choice.

ARGUMENT

I. INTRODUCTION.

In an amicus curiae brief in this action, the Solicitor General has urged this Court to overturn its decision in Roe v. Wade, 410 U.S. 113 (1973), holding that a woman has a fundamental right to decide whether to terminate a pregnancy, and, by

implication, the score of its decisions which have accepted and applied Roe v. Wade.

Only two years ago the Court reviewed and explicitly reaffirmed Roe v. Wade in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). In fact, in Akron the Court not only approved Roe v. Wade, but also clearly reaffirmed that a woman's right to choose whether to terminate a pregnancy is a fundamental constitutional right and, therefore, any state regulation of it is subject to strict scrutiny.

The Solicitor General would take away a woman's right to

choose whether to terminate her pregnancy and instead interject governmental control into our most personal and private decisions. Adoption of the Solicitor General's position would result in a return to the days of unsafe, illegal abortions for women unable to endure a harmful or unwanted pregnancy.

Amici curiae believe that every person has a constitutional right to be free from the intrusion of the government into his or her most intimate personal decisions, and that this right clearly encompasses a woman's right to choose what will happen to her own body and, indeed, her own life. In this

brief, amici curiae will demonstrate that the decisions in Roe v. Wade and Akron should be reaffirmed not only on the basis of stare decisis, but also on the ground that they were correctly decided in the first instance. Amici urge the Court to once again reaffirm what has become a long line of decisions recognizing and protecting a woman's right to reproductive choice.

II. STARE DECISIS REQUIRES THAT ROE V. WADE BE REAFFIRMED.

The Solicitor General urges the Court to ignore the doctrine of stare decisis as applied to a woman's well-recognized constitu-

tional right to decide whether to terminate her pregnancy. This position underrates the strength and significance of the doctrine of stare decisis, particularly as applied to this Court's decision in Roe v. Wade.

A. Reaffirmance of Roe v. Wade Will Promote Stability, Judicial Efficiency and Public Faith in the Judicial System.

This Court has explained the purpose and importance of the doctrine of stare decisis by saying:

> "Very weighty considerations underlie the principle that Courts should not lightly overrule past decisions.

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

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IN THE

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM J. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC.

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Statement of Interest of *Amicus Curiae*

The National Family Planning and Reproductive Health Association, Inc. is a broad-based coalition of family planning providers and consumers working together to enhance the delivery of family planning services throughout the United States. Committed to the concept of reproductive freedom for all Americans, NFPHRA seeks to ensure that adults and adolescents alike obtain relevant information and medically necessary clinical services pertaining to family planning and reproductive health care, *inter alia*, abortion. Validation of the Pennsylvania Abortion Control Act would significantly limit reproductive freedoms and the availability of proper clinical services.

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No. 84-495

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Summary of the Argument

The Court of Appeals for the Third Circuit properly struck down those provisions of the Pennsylvania Abortion Control Act addressed to informed consent and post-viability abortions. In addition, the Court of Appeals properly enjoined the operation of the parental consent provisions.

Section 3205(a) impermissibly intrudes into the physician-patient relationship, by mandating that a *physician* supply each woman desirous of an abortion specified information. As the "physician-only" requirement is not severable, Section 3205(a)(1) is unconstitutional in its entirety. Section 3205(a)(2) is also unconstitutional, in that it requires that each woman be provided with an opportunity to review additional information immaterial to rational decision-making, regardless of the woman's prior knowledge or awareness, or whether her review of such information is deemed medically inadvisable. Finally, the informed consent provision reflects the efforts of the General Assembly to skew a woman's choice in favor of childbirth, and thus, does not withstand constitutional scrutiny.

Section 3206, the parental consent or consent substitute provision, unconstitutionally fails to afford sufficient protection to the right of an unemancipated minor to procure an abortion. By mandating that a parent be provided with inflammatory materials and biased information devoid of medical relevance, Section 3206 attempts to persuade parents to irrationally withhold consent to an abortion. The procedural mechanism available to a minor for obtaining judicial consent in lieu of parental consent is also constitutionally defective, in that it fails to maintain essential confidentiality, and permits an individual untrained in reproductive health to override the physician's professional judgment, on the basis of an overbroad standard of "usefulness."

The Pennsylvania standard-of-care provision for post-viability abortions, requiring as it does use of the method most likely to result in fetal survival, unless that method would significantly increase the risk to maternal life or health, unconstitutionally elevates fetal life over maternal health and may require a woman to endure increased personal risk for the sake of the fetus. Similarly, the requirement that, *in all cases*, the attending physician secure the attendance of a second physician with responsibility solely to the fetus, at the risk of criminal sanction, is constitutionally deficient, given its failure to allow for emergency situations.

Introduction

In 1973, this Court definitively announced that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. *Roe v. Wade*, 410 U.S. 113, *Reh. Den.* 410 U.S. 959 (1973). As with other fundamental rights, however, the right of a woman to elect to undergo an abortion is not unqualified. Rather, in recognition of a State's legitimate interest in the health of a woman, and in the potential life represented by the fetus, this Court has permitted states to impose carefully tailored restrictions, designed solely to advance those particular state interests, on the procurement of an abortion. *See, e.g., Simopoulos v. Virginia*, 462 U.S. 506 (1983) (Requirement that all second-trimester abortions be performed in hospital or out-patient clinic upheld); *Planned Parenthood Association of Kansas City, MO v. Ashcroft*, 462 U.S. 476 (1983). (Requirement that a pathology report be prepared for each abortion performed upheld.)

In promulgating the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Sections 3201 *et seq.* (hereafter, the Act), the Pennsylvania Legislature greatly exceeded the permissible constitutional parameters of abortion legislation, and legitimate state interest established by the decisions of this Court. Thus, *amicus curiae* maintains, the Court of Appeals for the Third Circuit properly invalidated those provisions of the Act imposing an "informed consent" requirement, 18 Pa. Cons. Stat. Sections 3205 and 3208, those provisions regulating the performance of abortions after viability, 18 Pa. Cons. Stat. Sections 3210(b) and (c), and those mandating the compilation and filing of detailed reports, 18 Pa. Cons. Stat. Sections 3211(a) and 3214. In addition, *amicus curiae* contends, the Court of Appeals properly enjoined the enforcement of the parental consent provision, 18 Pa. Cons. Stat. Section 3206.

ARGUMENT

I. The Court of Appeals for the Third Circuit properly invalidated the Act's informed consent provisions, given that they impermissibly require that (1) a *physician* relate certain information to each woman considering abortion, and (2) that information outside the scope of medical expertise and designed to promote, in a non-neutral fashion, the Commonwealth's policy preference for childbirth over abortion be presented; these requirements unduly interfere with the physician-patient relationship and impermissibly influence a woman's choice between abortion and childbirth.

In 1976 this Court acknowledged the validity of a Missouri statute requiring that an attending physician obtain the informed consent of a woman, in writing, prior to performing an abortion. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). As this Court reasoned,

> The decision to abort . . . is an important and often a stressful one, and it is desirable that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent. *Id.*, at 67.

Although the statute at issue in *Danforth* did not specifically define "informed consent", this Court did define it, as information indicating "just what would be done and . . . [the] consequences." *Id.* at 67, N. 8. As the *Danforth* Court explained, "to ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable strait-jacket in the practice of his profession." *Id.* Thus, states legitimately may seek to insure that the decision to abort has been made "in the light of all attendant circumstances—pyschological and emotional as well as

physical—that might be relevant to the well being of the patient." *Colautti v. Franklin*, 439 U.S. 379, 394 (1979). States may also express a policy preference for childbirth. Statutes and Regulations, however, which unreasonably place "obstacles in the path of the doctor upon whom the woman is entitled to rely for advice in connection with her decision," *Whalen v. Roe*, 429 U.S. 589, 604 N. 33 (1977), or which are designed to influence a woman's informed choice between abortion or childbirth, are constitutionally impermissible. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443-444 (1983).

Pennsylvania's Abortion Control Act conditions a physician's performance or inducement of an abortion on a woman's written voluntary and informed consent. 18 Pa. Cons. Stat. Section 3205. A woman's consent will not, however, be deemed voluntary and informed unless she is provided with information addressed to eight specific areas. The Act's informed consent provisions do much more than require that a woman be told what is to be done and the consequences as mandated by *Danforth*. Rather, by requiring that a *physician* relate certain information to each woman considering abortion, and by mandating that other information outside the scope of medical expertise and clearly designed to promote, in a non-neutral fashion, the Commonwealth's policy preference for child-birth over abortion, be presented, the Act attempts to extend Pennsylvania's interest in ensuring informed medical consent beyond the constitutional limits of consent and into the area of influence.

Section 3205(a)(1) requires that a woman be made aware of (1) the name of the physician who will perform the abortion; (2) the possibility of detrimental physical and psychological effects, not accurately foreseeable at present; (3) the medical risks associated with the particular abortion procedure chosen for her, including,

when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility; (4) the probable gestational age of the "unborn child" at the time for which the abortion is scheduled, and (5) the medical risks associated with carrying the "child" to term. In addition, the class of individuals legislatively approved as the source of the information referred to above is restricted; Section 3205(a)(1) explicitly states that, "the physician who is to perform the abortion or [the referring physician], but not the agent or representative of either," convey this information.[1]

This Court recently invalidated a similar "physician only" requirement. *City of Akron, supra.* Conceding the invalidity of such a requirement, appellants focus on the Act's severability clause.[2] Thus, appellants conclude, the "physician only" requirement, though objectionable, is severable and may be removed. Appellants argue that if modified to remove the physician only requirement, Section 3205(a)(1) is constitutional. *Amicus curiae* strongly disagrees.

The legislative scheme governing informed consent to an abortion in Pennsylvania clearly reflects the intent of the General Assembly that the operating or referring physician be the individual from whom a woman considering pregnancy termination receives the requisite information. Section 3205(a)(1) unequivocally seeks to guarantee that a woman receives this information from the physician who is to perform the abortion or the referring physician, *and no one else*; failure to provide the information subjects a physician to suspension or

[1] Section 3205 also mandates that a woman be provided with this information "at least 24 hours before the abortion." Appellants concede the invalidity of such a requirement: this provision is not at issue in the instant appeal.

[2] Section 5 of Act 1982, June 11, P.L. 476, No. 138, provides that the provisions of the Pennsylvania Abortion Control Act "shall be severable."

revocation of his license. Section 3205(c). As this Court has observed, the starting point in interpreting a statute is the language of the statute itself; absent a clearly expressed legislative intent to the contrary, statutory language must ordinarily be regarded as conclusive. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102 (1980). Here, the legislative will that a treating or referring physician "inform" a woman contemplating abortion of the name of the attending physician, the attendant risks, and the status of the fetus, finds clear expression in Section 3205(a)(1). Thus, the Court of Appeals for the Third Circuit properly concluded that excision of the admittedly unconstitutional language from Section 3205(a)(1) would not advance the goal of the Pennsylvania General Assembly but, rather, would impede it.

This conclusion is strengthened, *amicus curiae* contends, by consideration of Section 3205 in its entirety. *See United States v. Morton,* _____ U.S. _____, 104 S. Ct. 2769, *Reh. Den.* _____ U.S. _____, 105 S. Ct. 27 (1984); *Kokoszka v. Belford,* 417 U.S. 642, *Reh. Den.* 419 U.S. 886 (1974). (Statutory phrases are not to be construed in isolation, but are to be viewed in light of the entire statute.) The two principal components of the Pennsylvania informed consent requirement, Sections 3205(a)(1) and (2), received dissimilar treatment at the hands of the Legislature. While Section 3205(a)(1) requires the information detailed therein to be disseminated by the attending or referring physician, Section 3205(a)(2) expressly permits the physician or an agent of the physician to apprise the woman of other information deemed legislatively relevant to her decision. Although appellants contend that this differentiation suggests that the Pennsylvania Legislature did not view the identity of the source of information as critical, the statutory language itself undermines appellants' position. Where the Legislature selects and includes

particular language in one part of the statute but omits it in another section of the same act, it is generally presumed that the Legislature acted intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, _____ U.S. _____, 104 S.Ct. 296 (1983). Simply stated, the Legislature's use of different language in statutory provisions addressed to the same subject-matter does not reasonably warrant the conclusion that the Legislature was unconcerned with whether different conduct was thereby prescribed. By placing "physician-only" language in Section 3205(a)(1) and "physician or agent" language in 3205(a)(2) it must be concluded that the Legislature intended that physicians and physicians only must provide the information required by 3205(a)(1). *Cf., City of Akron, supra.* (Pervasive "physician only" requirement of abortion statute's informed consent provision is indicative of legislature's concern that similar treatment be given to all classes of information.)

Appellants persist, however, contending that the Pennsylvania Legislature would have preferred a requirement that the information referenced in Section 3205(a)(1) be provided by a physician *or his agent*, to the absence of any requirement that the information be conveyed at all—the result of a finding of nonseverability. *Amicus curiae* strongly urges this Court, however, to decline appellants' invitation to engage in such speculation. The Pennsylvania General Assembly made the impermissible "physician only" requirement an integral part of Section 3205(a)(1). Thus, the Court of Appeals properly rejected appellants' claim of severability.

Similarly, Section 3205(a)(2) of the Act impermissibly infringes upon the role of a physician or counselor, thinly concealing an attempt to advance the Commonwealth's preference for childbirth by persuading pregnant women

to pursue this alternative.[3] Section 3205(a)(2) requires a physician or his agent to advise each woman desirous of terminating her pregnancy of the potential availability of medical assistance benefits for prenatal care, childbirth, and neonatal care, and of the father's liability to support the child. 18 Pa. Cons. Stat. Sections 3205(a)(2)(i) and (ii). Clearly, a requirement that such information be provided goes far beyond the informed consent provision approved in *Danforth, supra*, as well as the concept of informed consent as defined by the Pennsylvania Legislature within the context of medical practice and procedures. As the Pennsylvania Health Care Services Malpractice Act indicates, a patient's consent will be considered informed when she has been made aware of "the nature of the proposed procedure or treatment and of the risks and alternatives to treatment or diagnosis that a reasonable patient would consider material to the decision whether or not to undergo treatment or diagnosis." 40 P.S. Section 1301.101. The obligation to discuss *medical* risks and alternatives with a patient is qualified, however; a physician is relieved of professional liability for failing to furnish such information if it would have had a serious adverse effect on the patient or on the therapeutic process to the material detriment of the patient's health. *Id.*

Courts in several jurisdictions have concluded that "informed consent" as defined for medical practice and procedure purposes should also be the standard used in the abortion context. As the Court observed in *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F.Supp. 1136 (D.R.I., 1982), there is no *medical* justification for differentiating between abortions and other surgical procedures; requiring disclosure of even all medical risks would constitute a substantial interference in the doctor-patient relationship. *Id.*, at 1152.

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[3] An appellate court can affirm on any basis, regardless of whether that reason was advanced by the court whose decision is reviewed. *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

If a requirement that, notwithstanding the medical advisability, a woman be apprised of all medical risks attendant to a procedure, cannot be justified, nor can a requirement that non-medically related information be conveyed in the context of abortion solely as a medical procedure. Indeed, in *Freiman v. Ashcroft*, 584 F.2d 247 (8th Cir. 1978), aff'd 400 U.S. 941 (1979), the Court of Appeals for the Eighth Circuit rejected a requirement that a physician advise a woman that she would have no legal rights in a child born during an attempted non-therapeutic abortion. As the appellate court remarked,

> "[T]he Supreme Court did not hold that a state may require a physician to provide to each patient any and all information required by the state, regardless of its legality, constitutionality or medical advisability. . . . [A]lthough requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, the requirement that the physician tell his patient [that she will have no rights in a child resulting from the attempted abortion] is not reasonably related to the purpose of informed consent. . . *The result of a physician's warning would be to inject into the decision-making process between physician and patient a factor which is irrelevant and extraneous to the medical services being rendered.*" (Emphasis added)

584 F.2d at 251.[4]

Also addressing the disparity in standards of informed consent for abortion and all other medical procedures, the Court of Appeals for the First Circuit noted that a description of "the availability of alternatives to abortion" had no direct bearing on any medically relevant factor, and thus, did not fit within the

[4] Although the statute reviewed in *Freiman, supra*, required the attending physician to inform the woman of the legal implications of her decision, the instant statute permits the delegation of this responsibility. This distinction is not, however, dispositive, given the analysis here presented.

traditional ambit of informed consent, confined to the disclosure of matters within the physician's special knowledge or expertise. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981). As the Court then remarked,

> [T]hat traditional understanding has been derived from the role played by informed consent as a malpractice litigation doctrine, a context in which doctors are individually held responsible for the dispensation of certain information and in which it makes eminent sense to limit their obligation to matters within their special competence. Here, by contrast, no concern for physician liability is present; the sole question is whether the information would serve to make a woman better informed or not.

Id., at 1020.

Unlike the Massachusetts provision scrutinized in *Planned Parenthood League of Mass. v. Bellotti, supra*, Section 3205 of the Pennsylvania Abortion Control Act expressly states that a physician who violates its provisions "is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be subject to suspension or revocation." 18 Pa. Cons. Stat. Section 3205(c). Similarly, the failure of any other individual to provide a woman with the requisite information subjects him or her to criminal sanctions. As such, it makes "eminent sense to limit [the physician's and his agent's] obligation to matters within their special competence"—the rendition of medical information and services.

The information required by Section 3205(a)(2) exceeds the traditional obligation to discuss medical risks, and interposes alternatives to abortions. The Act's required recitation of financial assistance and parental support liability information, Section 3205(a)(2)(i) and (ii), injects into the decision-making process factors unrelated to the rendition of medical services or medical risks associated

with abortion. Under the guise of informed consent as a mandate of good medical care, the Act is trying to disseminate information which is not relevant to informed medical consent, and thus, which advances no legitimate State interest. Moreover, compliance may well prompt questions whose answers lie outside the realm of medical expertise and outside the ambit of physical or psychological factors related to abortion. As such, these components of the informed consent provisions can only be viewed as additional, unwarranted burdens on a woman's decision, and thus, attempts to influence the decision itself; these requirements lie outside of legitimate state interests and, consequently, intrude upon a woman's right to a personal and uninfluenced choice to undergo an abortion.

Section 3205(a)(2)(iii) provides an even clearer illustration of the Commonwealth's impermissible efforts to convince pregnant women to choose childbirth over abortion. Pursuant to Section 3205(a)(2)(iii), a woman seeking an abortion must be informed of her right to review certain printed materials that describe the "unborn child" and list agencies which offer alternatives to abortion. Significantly, the Act describes these printed materials in Section 3208, which section is incorporated by reference into Section 3205(a)(2)(iii). Section 3208 requires that the materials include the following statement:

> There are many public and private agencies willing and able to help you carry your child term, and to assist you and your child after your child is born, whether you chose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion.

18 Pa. Cons. Stat. Section 3208(a)(1).

Section 3208 further mandates that a woman be provided with an opportunity to review, if she so desires,

> . . . materials designed to inform the woman of the probable anatomical and physical characteristics of the unborn child at two week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival.

18 Pa. Cons. Stat. Section 3208(a)(2).

Numerous flaws are readily discernable here. The materials available for review must contain a statement, attributable to the Commonwealth, urging a woman to contact certain agencies prior to finalizing her decision. Clearer evidence of the Commonwealth's efforts to dissuade a woman from pregnancy termination is not often found. In fact, Section 3205(a)(2)(iii) describes these agencies as "alternatives to abortion". Moreover, Section 3208's repeated references in required information to the fetus as an "unborn child" and, in particular, the requirement that the materials contain a statement by the Commonwealth describing the fetus as a "child" evidence the Commonwealth's impermissible efforts to skew a woman's decision in favor of childbirth. Since the fetus is not a person, *Roe v. Wade*, 410 U.S. at 156-158, neither is it a "child". *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, *Gerstein v. Poe*, 428 U.S. 901 (1976). Thus, a state may not require that women electing pregnancy termination be told, in effect, that the fetus is a child, since to do so improperly influences choice by state action; *Roe* prohibits promotion of one theory of when life begins, to justify abortions. *Accord*, *City of Akron*, *supra*. (Requirement that patient be told that "the unborn child is a human life from the moment of conception" invalidated.)

Furthermore, although Section 3208 requires that materials detailing the probable anatomical and physiological characteristics of the "unborn child" at two-week gestational increments from fertilization to full-term "be objective, non-judgmental and designed to convey only accurate information about the unborn child

at the various gestational ages," this statutory scheme nonetheless prejudicially impacts on a woman's decision, for several reasons. First, information as to the fetus' physiological characteristics is not directly related to any medically relevant fact *vis-a-vis* the woman, and thus does not advance the need for accurate medical information of risks associated with abortion that defines the limits of informed consent. Rather, as the record reveals, receipt of this information may cause many women seeking abortions emotional distress, anxiety or fear; clearly, it is the impact on women in this stressful situation, rather than on detached readers, against which the information must be measured. (Stipulation of facts, §§109 and 110). Moreover, such effects may be magnified in certain classes of appellees' patients for whom the abortion decision may be inherently more stressful, *e.g.*, those who suffer from such diseases or conditions as diabetes, kidney disease, hemorrhaging or sickle cell anemia, and to whom carrying a pregnancy to term would seriously endanger life or health. (Stipulation of facts, §44.) Lastly, the descriptions required to be made available to a woman encompass all stages of fetal development "at two-week gestational increments from fertilization to full term," rather than merely at the time at which a particular woman seeks an abortion. Thus, Section 3202 mandates that a woman be provided with the opportunity to review clearly irrelevant and potentially misleading information, unrelated to the time at which consent is given by viewing fetal development beyond the point of her own pregnancy.

These aspects of the Pennsylvania Abortion Control Act's informed consent provisions embody, *amicus curiae* maintains, an enforced and, in many instances, medically contraindicated state lecture. Consideration of the factors noted above suggests that the primary import, and indeed the primary purpose, of the required information is not so much factual as it is moral. It is unrelated to maternal medical health but related to the

effort to influence decisions on abortion. See 18 Pa. Cons. Stat. Section 3202(c). To the extent that the state may require that information be made available, it must be neutral and objective; coercive state indoctrination of particular values or ethical judgments is objectionable to First as well as Fourteenth Amendment principles. *Amicus curiae* recognizes that implementation of Section 3208 may not result in descriptions as blatantly offensive as those previously deemed unconstitutional. *See e.g., City of Akron, supra* (Requirement that woman be provided with description of fetal characteristics including appearance, mobility, tactile sensitivity, and brain and heart function, invalidated.) The burdens described above however, flow from the very fact that women desirous of further education regarding abortion alternatives will be subjected to prescribed fetal descriptions; the failure to serve any state interest is equally true of all such descriptions. *Amicus curiae* thus urges this Court to conclude that the only appropriate judicial response to such descriptions is to prohibit them all together.

Appellants argue that the requirement that a woman be made aware of the existence of the Section 3208 materials does not skew her decision, because such a skewing effect can only be produced by the nature of the information provided if she chooses to make use of such materials. Appellants, however, discount the fact that affirmative action is required by the physician or his agent, who must orally advise the patient that materials describing the fetus at various gestational ages and listing agencies which offer alternatives to abortion have been prepared by the Department of Health, and where they may be obtained. To say that the mandate of the statute merely ensures that the materials are available is illusory. The mandated discussion of the availability of materials and the mere discussion of the nature and content of the materials is coercive to freedom of choice since it must entail a description of constitutionally impermissible information. In many cases, depending on

the curiousity of the patient, once informed of the existence of these materials and their basic content, a physician or counselor may feel compelled to offer an evaluation or may be forced to answer any resultant questions, thereby further influencing freedom of choice. For example, if told that the materials describe the "unborn child" a woman may inquire into the nature of the description presented. To answer her question, the physician or counselor must tell her that the materials describe the probable anatomical and physiological characteristics of the "unborn child" at two-week gestational intervals, and discuss the possibility of fetal survival at any given point. As a result, the physician or counselor has directly provided the patient with clearly irrelevant, and perhaps, medically inadvisable, information. Similarly, in response to a patient's inquiry regarding the materials addressed to abortion alternatives, the physician or counselor would be compelled to advise the patient that the materials catalog private and public agencies offering financial assistance and the placement of children through adoption. Thus, a physician or counselor by notifying a woman of the existence and availability of constitutionally impermissible material cannot play a passive role in administering this requirement—that would be inconsistent with his or her professional responsibility.

The egregiousness of Section 3205(a)(2), in practical effect, is underscored by the fact that it preys on the trusting relationship between a woman and the physician or counselor to whom she turns during this stressful and vulnerable period. Although this Court has often emphasized the central role of physicians in the abortion decision, *City of Akron, supra; Colautti v. Franklin, supra*, Section 3205(a)(2) effectively converts the physician or counselor into a spokesperson for the Commonwealth, promoting the Commonwealth's biased

viewpoint, regardless of whether abortion would effectuate the preferred medical judgment in any given case.

Invalidation of Section 3205 will not subvert the Legislature's legitimate policy choice that a woman's decision to terminate her pregnancy be informed. As the record reveals, appellee agencies and physicians encourage adult women to participate in options counseling, and require minors to do so, prior to finalizing their decisions regarding their pregnancies (Stipulation of Facts, §§11, 17, 24 and 95), and require all women desirous of terminating their pregnancies to undergo counseling prior to submitting to an abortion (Stipulation of facts, §§14, 31 and 40). As such, trained professionals and paraprofessionals advise pregnant women of the relative *medical* risks involved and encourage them to discuss their views on, and reservations concerning, abortions (Stipulation of facts, §§13, 20, 21, 22, 31, 38-39). Counselors are alert for women who are hesitant or ambivalent about the abortion decision; women who exhibit such hesitancy or ambivalence are provided with additional counseling, and in some cases, rescheduled for the procedure at a later date.

Thus, a woman who prefers to carry out her pregnancy to term or who is ambivalent or hesitant about which option to pursue can be made aware of the types of services reflected in the available materials, and be afforded an opportunity to review them, if desired. But, a *requirement* that *every* woman be told of the availability for review of materials dealing with alternatives to abortion and describing fetal physiology in detail and which, if described, would expose her to the Commonwealth's strong recommendation urging her to contact financial assistance and adoption agencies, and thus, in effect change her mind, is impermissible. Women who choose the abortion alternative can reasonably be presumed to know that the alternative to abortion is childbirth; it is this knowledge that impels them to seek an abortion in the first place. Similarly, women who elect

to terminate their pregnancies are aware of the procedure's central consequence: the adequacy of a woman's knowledge need not be and should not be gauged solely by the information imparted by a physician or counselor. Insofar as Sections 3205(a)(2) and 3208 require that medically irrelevant information be made available in an unsettling form, they effectuate a blatant intrusion into the decision making process, as the state attempts to influence the ultimate decision. Accordingly, the Court of Appeals for the Third Circuit properly invalidated Sections 3205(a)(2) and 3208.

II. The Pennsylvania Abortion Control Act's "substitute consent" provision impermissibly requires that a parent or guardian be presented with inflammatory information and materials irrelevant to a determination of a minor's best medical interest. Similarly, the procedural rules adopted to implement this provision fail to ensure that consideration be given only to factors medically related to the abortion decision, and that anonymity is maintained. Thus, the Act fails to adequately protect the constitutional right of an unemancipated woman to obtain an abortion.

Section 3206 of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Section 3206, and the procedural rules adopted to supplement it, suffer from many of the constitutional infirmities discussed in the context of the informed consent provision, 18 Pa. Cons. Stat. Section 3205. In addition, the procedural rules fail to ensure that an unemancipated minor is afforded the privacy and confidentiality constitutionally required. Thus, *amicus curiae* strongly urges this Court to invalidate Section 3206, and to reject Pennsylvania Orphans' Court Rule 16.[8]

[8] *Amicus Curiae* recognizes that no cross-appeal has been filed from that part of the Court of Appeals' decision sustaining, on its face, the validity of Section 3206. Given, however, that a finding by this Court that Section 3206 is unconstitutional would have the same practical effect as the Court of Appeals' decision to enjoin operation of Section 3206, *amicus* respectfully requests this Court to review both Section 3206 and the procedural rules adopted by the Pennsylvania Supreme Court, subsequent to the Court of Appeals' decision in this case.

In *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion), this Court acknowledged the qualitative difference between the abortion decision and other decisions a young woman may be called upon to make during her minority:

> The need to preserve the constitutional right and the unique nature of the abortion decision ... require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Id., at 642. While a State's interest in protecting immature minors will, then, sustain a requirement of a "consent substitute", *e.g.* a parent, the State must also establish an alternate confidential procedure whereby an unemancipated minor will have the opportunity to fairly demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests. *City of Akron*, *supra*, at _____; *Bellotti v. Baird*, *supra*, at 643-644.

A "consent substitute" may not, however, be presented with biased and irrelevant information to which the pregnant woman herself may not constitutionally be exposed, *amicus* maintains—otherwise the "substitute" is not really a substitute. Although a parent, for example, is less directly affected by the abortion decision than is the young woman herself, a state may determine that the decision's effect on family stability and the parental role in child-rearing justify parental intervention. *Bellotti v. Baird*, *supra*. A state is thus permitted to conclude, implicitly, that, apart from the physical aspect, the abortion decision impacts as greatly on the minor woman's family as it does on her. Concomitantly *amicus curiae* contends, it may not constitutionally be said that the abortion decision impacts *more* on the woman's family than on the pregnant woman. As such, factors constitutionally irrelevant to the abortion decision if left

solely to the pregnant minor are also constitutionally irrelevant to any decision made by a "consent substitute."

Section 3206(a) of the Pennsylvania Abortion Control Act requires that, where an unemancipated minor seeks parental consent to an abortion, the parent must be provided with "the information *and materials specified in Section 3205.*" (Emphasis added). Significantly, Section 3206(a)'s reference to Section 3205 is not limited to Section 3205(a)(i), *i.e.*, the medical risks to treatment. Rather, Section 3206 refers to Section 3205 in its entirety, thereby encompassing Section 3205(a)(2), and the Section 3208 materials. Moreover, while amicus has argued that, in effect, Section 3205(a)(2) guarantees that a woman be told of the nature and basic content of the materials mandated by Section 3208, Section 3206(a) *expressly* requires that the parent be provided with these irrelevant and highly inflammatory materials *themselves.* Thus, while a pregnant woman herself may elect to forego review of the actual materials as prepared by the Department of Health, the physician may not afford the parent a similar option.

In addition, although Section 3205 permits the provision of at least some of the information legislatively deemed necessary to informed consent by the physician or his agent, Section 3206 requires a *physician* to provide the parent with the information *and materials* detailed in Sections 3205 and 3208.

The *requirement* that the parent whose consent to an abortion upon a minor woman is sought, be provided with biased information, irrelevant to the medical abortion decision and which a state may not require to be provided to the pregnant woman herself, must be characterized as a blatant effort by the Commonwealth to influence the decision.

An unemancipated woman may choose, for whatever reason, not to seek parental consent to an abortion. In such cases, resort may be made to the judiciary. Section

3206(c) authorizes the filing of a petition to the Court of Common Pleas in the county in which the woman resides or in which the abortion is sought. Section 3206(c) further directs that an "appropriate" hearing be held, after which the Court, upon a finding that the woman is mature and capable of consenting to the abortion, and has consented, must authorize the performance of an abortion. If, however, the Court finds that the woman is incapable of giving informed consent, or the women does not claim to be sufficiently mature, the Court must determine whether the abortion would serve the woman's best interests, and if so, must authorize the procedure. 18 Pa. Cons. Stat. Section 3206(d).

Section 3206(d) thus requires the Pennsylvania judiciary to intrude into the realm of medical advisability and decision-making traditionally restricted to those individuals licensed to practice medicine in this Commonwealth. Regardless of the decision eventually reached, Section 3206(d) requires a judge, in prescribed circumstances, to independently assess the determination of medical necessity already made by the minor woman's own physician and to perhaps second-guess a medical decision of the person best educated and informed to make such decisions. *See* 18 Pa. Cons. Stat. Section 3204 (No abortion shall be performed but upon a finding that the procedure is necessary.) Although this Court has often acknowledged the pivotal role played by the physician in the abortion decision, *See, e.g., Colautti v. Franklin, supra,* Section 3206(d) permits an individual untrained in medicine to discount, or even reject, the physician's best professional judgment, in his effort to ascertain the minor's "best interests"—a concept incapable of precise definition and whose use in the context of restricting a minor's exercise of a unique, fundamental right is impermissible.

The procedural rules adopted to implement Section 3206 do not cure its deficiencies but, rather, add to them. Noteworthy here is Pennsylvania Orphans' Court Rule

16.5. Rule 16.5 directs the Court, at a hearing held pursuant to Section 3206(c), to hear evidence related to the young woman's emotional development, maturity, intellect and understanding, her pregnancy, possible consequences and alternatives to the abortion, and "any other evidence that the Court may find useful" to its determination. Significantly, the Court's solicitation of additional "useful" information is not limited to relevant physical or psychological factors impacting on the decision. Rather, under the aegis of "usefulness", a court conceivably could consider, for example, parental objections based on religious views.[6] While this Court has approved a prohibition of consideration of parental objections, *Bellotti v. Baird, supra*, at 644, neither Section 3206 nor the rules designed to implement it contain such a prohibition.

Finally, while Section 3206 pays lip-service to the confidentiality requirement enunciated in *Bellotti v. Baird, supra*, 18 Pa. Cons. Stat. Section 3206(f), the procedures implemented by the Pennsylvania Supreme Court are woefully inadequate for the preservation of a young woman's privacy. All petitions seeking authorization for an abortion must include the minor's initials, the name and addresses of her parents, and her signature. Pennsylvania Orphans' Court Rules 16.2(a)(1)(3) and (7). While anonymity may be preserved by the use of a minor's initials on the petition, *Planned Parenthood, Kansas City, Mo. v. Ashcroft*, at n. 16, the required inclusion of names and addresses of parents, and of the minor's own signature, nullifies efforts to protect her identity.

Furthermore, while the Act permits an unemancipated minor to seek judicial authorization of an abortion without consulting with her parent, 18 Pa. Cons. Stat. Section 3206(c), Rule 16.4 states, in part:

> All persons shall be excluded from the hearings *except* the applicant, *her parents or persons standing in loco parentis*, and such other person's whose presence is specifically requested by the applicant or her guardian.

[6] As discussed further below, a parent may not be excluded from a Section 3206(c) hearing.

Pennsylvania Orphans' Court Rule 16.4 (emphasis added). Thus, even if a minor elects not to inform her parents of her pregnancy, one or both may, upon so learning through whatever means, attend the hearing, notwithstanding any objections voiced by their daughter. In addition, the Court could conceivably deem "useful" any comments that the parent or parents might wish to make.

A parent may not be given a veto power over the decision of an unemancipated daughter to terminate her pregnancy. *Danforth, supra*. While on its face Section 3206 does not conflict with this constitutional principle, the rules adopted to implement the statute achieve the same effect by (1) permitting parental attendance, even where the minor has chosen not to notify her parents of her decision, and (2) failing to prohibit the solicitation of parental comments regarding the decision if deemed "useful". As Sections 3206 and Orphans' Court Rule 16 thus inadequately preserve a minor's fundamental, albeit limited, right to an abortion, *amicus curiae* urges this Honorable Court to invalidate Section 3206, and to reject Pennsylvania Orphans' Court Rule 16.

III. The Court of Appeals for the Third Circuit properly invalidated Section 3210(b), given that a woman may not constitutionally be required to bear an increased medical risk in order to preserve the life of a viable fetus.

Any abortion currently performed in Pennsylvania upon a viable fetus must be performed in the manner most likely to result in fetal survival "unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman." 18 Pa. Cons. Stat. Section 3210(b). This requirement, *amicus*

curiae maintains, impermissibly places priority on the life of the fetus over the health of a pregnant woman, and thus, was properly invalidated.

In 1979, this Court struck down the prior standard-of-care provision applicable to post-viability abortions in Pennsylvania. *Colautti v. Franklin, supra.* Requiring that a physician employ the abortion technique most likely to result in a live birth "so long as a different technique would not be necessary in order to preserve the life or health of the mother," the earlier statute was invalidated on the basis of its inherent ambiguity. As the court remarked,

> [It] is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount or his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and . . . fetal survival. Serious ethical and constitutional difficulties . . . lurk behind this ambiguity.

Id., at 400.

The constitutional difficulties alluded to by the *Colautti* Court stem, *amicus curiae* maintains, from the conclusion implicit in *Roe v. Wade, supra:* even post-viability, a woman may not be forced to endure an increased health risk, for the sake of the fetus. The instant statutory scheme, however, imposes such a requirement, and thus, is unconstitutional.

Section 3210(b) requires a physician to determine prior to aborting a viable fetus, which of the available methods or techniques will present the best chance for fetal survival. Use of that particular method is then statutorily prescribed, except in those instances where its use would pose a "significantly greater" medical risk to the life or health of the mother than would another available method. The phrase "significantly greater" thus presumes that there may be abortion methods for use post-viability which will increase the risk to maternal

health, but whose use will not rise to the level of a "significantly greater" medical risk. To illustrate: There may be five abortion techniques available, two of which are unsuitable for post-viability abortions, given the advanced state of the pregnancy. The remaining three methods may present varying degrees of medical risk to the woman. If none of the available methods would present a "significantly greater" health risk to the woman, the physician must, under threat of criminal sanction, choose from the three available methods the one most likely to preserve fetal life or health, notwithstanding the availability of an alternate method which would present less risk to the pregnant woman. Thus, the method best calculated to save the fetus may not be the method of least medical risk to the woman. Although the Constitution does not permit a requirement that an abortion be performed by other than the method of least risk to the woman, Section 3210(b) of the Pennsylvania Abortion Control Act imposes such a requirement, and thus is unconstitutional.

The prominent place reserved to fetal life by the Act is further evidenced by the fact that, in assessing the risk presented by any given pregnancy termination procedure, the woman's physician specifically may not consider the potential psychological or emotional impact on the woman of fetal survival. Although this Court has required that a physician consider factors other than physical health in determining whether an abortion is necessary, *Doe v. Bolton,* 410 U.S. 179, *reh. denied,* 410 U.S. 979 (1973); *United States v. Vuitch,* 402 U.S. 62 (1971), and indeed, the Pennsylvania statute expressly so provides, 18 Pa. Cons. Stat. Section 3204, consideration of emotional, psychological and familial aspects is suspended when the physician decides upon the appropriate method of abortion, post-viability. Section 3210(b) is thus analogous to the Nebraska requirement that a post-viability abortion be performed in a manner compatible with protecting the woman from "an

imminent peril that substantially endangers her life or health" invalidated in *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981). Recognizing that a state may regulate post-viability abortions, the District Court nonetheless invalidated Nebraska Criminal Code Section 28-330, noting that the legislature's inclusion of the qualifying language rendered Section 28-330 unconstitutionally underinclusive. *See also Margaret S. v. Edward*, 488 F. Supp. 181 (E.D. La. 1980) (Louisiana statute permitting post-viability abortions only if necessary to prevent "permanent impairment" of a woman's health deemed unconstitutional.)

Similarly, Section 3210(b) impermissibly interferes with medical judgments by dictating a particular course of action, even when, in the physician's judgment, a different course should be taken to protect the woman from an increased health risk. This course of action a state has no authority to require. Consequently, the judgment of the Court of Appeals for the Third Circuit invalidating Section 3210(b) should be affirmed.

IV. The Court of Appeals for the Third Circuit properly invalidated the Act's "second-physician" requirement, given the absence of an exception for emergencies.

As noted above, the Pennsylvania statutory scheme requires physicians who perform abortions on fetuses determined to be viable to employ the abortion technique most likely to preserve fetal life, provided that use of that technique does not present a significantly greater medical risk to the life or health of the pregnant woman. 18 Pa. Cons. Stat. Section 3210(b). The statute also directs that in such cases, and in any other cases in which the method chosen does not preclude the possibility of fetal survival, the attending physician arrange for the attendance of a second physician. The second physician is required, immediately upon completion of the abortion procedure, to take control of

the child and provide him or her with all medical care reasonably necessary to preserve the child's life and health. 18 Pa. Cons. Stat. Section 3210(c).[7]

In reviewing a similar provision, five members of this Court upheld a second-physician requirement that could be interpreted as containing an exception for emergencies, during which the delay inherent in arranging for the presence of a second physician could adversely affect the pregnant woman's life or health. *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, supra.* Although the statute reviewed in *Ashcroft* did not expressly contain a medical emergency exception, such a construction was permissible, the Court concluded, by virtue of the statutory qualifying language; the second physician was compelled to "take all reasonable steps in keeping with good medical practice . . . to preserve the life or health of the viable unborn child, provided that it [did] not pose an increased risk to the life or health of the woman." *Id.*, _____ U.S. _____, 103 S.Ct. at 2522, n.8.[8]

Section 3210(c) of the Pennsylvania Abortion Control Act is, however, completely devoid of any references to maternal life or health, or to a medical emergency, as statutorily defined. 18 Pa. Cons. Stat. Section 3203. Nor does the statute permit a finding that the Legislature intended the clause in Section 3210(a), which provides a

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[7] The requirement that the attending physician, *in all cases* where the abortion method chosen does not preclude the possibility of a live birth, arrange for the attendance of a second physician, is further evidence that a woman may be required to subject herself to additional health risks apart from those inherent in the abortion decision itself, in the interest of fetal survival.

[8] *Amicus curiae* respectfully suggests that this Court's perception of an "emergency exception" in the Missouri Statute scrutinized in *Ashcroft* was misplaced, in that the above-quoted language referred to the responsibility of the second physician to the *fetus*, and not to the responsibility of the attending physician in arranging for the presence of a second physician.

defense for abortions performed on non-viable fetuses, or necessary to preserve maternal life or health, to be equally applicable to Section 3210(c). While Section 3210(a) states that these circumstances shall be a complete defense to any charge brought against a physician for violating the requirements of *this section*, *amicus curiae* contends that analysis of Section 3210 in its entirety undermines the conclusion that "this section" also refers to Sections 3210(b) and (c). Initially, *amicus curiae* notes that extension of these defenses to Section 3210(b) would be absurd. Section 3210(b) by its terms assumes viability, and thus contains a limited defense peculiar to that particular section: the physician's good faith judgment that use of the method most consistent with preservation of fetal life or health presented a significantly greater medical risk to the life or health of the pregnant woman than did the method actually used. Moreover, the maternal life and health "defense" within Section 3210(b) is itself more narrowly defined than that deemed permissible in the context of prohibiting abortions totally during the last trimester of a pregnancy. Given that the legislature will not be presumed to have intended an absurd result, *United States v. Turkette*, 452 U.S. 576, 580 (1981), the defenses contained within Section 3210(a) cannot be viewed as applicable to Section 3210(b). Appellants' argument that these defenses are similarly applicable to Section 3210(c), relying as it does solely on this expansive concept of the term "section", must thus fail.

Absent more explicit emergency situation language, *amicus* must suggest that the Court of Appeals for the Third Circuit properly invalidated Section 3210(b) of the Pennsylvania Abortion Control Act.

Conclusion

A State has a legitimate interest in the health of a pregnant woman, and in the potential life represented by the fetus. As such, a State may impose carefully-tailored restrictions on the procurement of an abortion, designed to advance these health interests. However, a statutory scheme which (1) requires that information and materials outside the scope of medical expertise and advisability and thus designed solely to promote, in a non-neutral fashion, a policy preference for childbirth over abortion, be presented to a woman desirous of an abortion or her parent, if she is unemancipated; (2) in the interest of preservation of fetal life, requires a woman who elects to terminate her pregnancy after the point of viability to submit to a procedure that does not present the least medical risk to her health, and (3) requires the presence of a second physician, with responsibility solely to the fetus, at *all* abortions performed post viability, exceeds legitimate state concerns, by unduly interfering with the physician-patient relationship and attempting to directly influence the abortion decision. The Pennsylvania Abortion Control Act is such a statutory scheme. Accordingly, *amicus curiae* respectfully urges this Honorable Court to affirm the judgment of the Court of Appeals for the Third Circuit entered in the instant case.

Respectfully submitted,

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Certificate of Service

I, ROBERT T CROTHERS, a member of the Bar of the Supreme Court of the United States, am counsel of record for the National Family Planning and Reproductive Health Association, Inc., *amicus curiae* herein. I hereby certify that on August 30, 1985, pursuant to Rule 28.5(b), Rules of the Supreme Court, I served a copy of the foregoing brief on each of the parties herein, as follows:

On Richard Thornburgh, H. Arnold Muller, Helen B. O'Bannon, Michael J. Browne, William J. Davis, LeRoy S. Zimmerman, and Joseph A. Smyth, Jr., Appellants, by depositing such copy in the United States Post Office, Washington, Pennsylvania, with first class postage prepaid, properly addressed to Andrew S. Gordon, the above-named Appellants, counsel of record, at the Office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

On the American College of Obstetricians and Gynecologists, Pennsylvania Section, Henry H. Fetterman, M.D., Thomas Allen, M.D., Francis L. Hutchins, Jr., M.D., Allen J. Kline, D.O., Brooks R. Susman, Paul Washington, Morgan P. Plant, Elizabeth Blackwell Health Center for Women, Planned Parenthood of Southeastern Pennsylvania, Reproductive Health and Counseling Center, and Women's Health Services, Inc., Appellees herein, by depositing such copy in the United States Post Office, Washington, Pennsylvania, with first class postage prepaid, properly addressed to Thomas E. Zemaitis, the above-named Appellees' counsel of record, at Suite 2001, the Fidelity Building, Philadelphia, Pennsylvania, 19109.

All parties required to be served have been served.

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By Robert T. Crothers

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Appellants

v.

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Appellees

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In the Supreme Court of the United States
October Term, 1985

No. 84-495

Richard Thornburgh, et al., Appellants

v.

American College of Obstetricians and Gynecologists, et al., Appellees

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No. 84-1379

Eugene F. Diamond, et al., Appellants

v.

Allan G. Charles, et al., Appellees

On Appeal From the United States Courts of Appeals for the Third and Seventh Circuits

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Brief for an Ad Hoc Group of Law Professors As Amici Curiae in Support of Appellees

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CONSENT OF PARTIES

Amici curiae file this brief with the consent of all the parties in support of the position advanced by the appellees.

INTEREST OF AMICI CURIAE

Amici Curiae are the individuals listed who compose an ad hoc group of professors teaching at various American law schools. The group represents a cross section of views and diverse interests. Amici all recognize the importance and emotional timbre of the issues raised in this case. They, however, believe that these issues should not be resolved at the expense of impugning the integrity of the federal judicial process simply because of the zealousness and fervor surrounding their public debate. Amici recognize and support the logical and orderly procedural flow of litigation, as well as adherence to constitutional requirements for the exercise of appellate jurisdiction. Amici, therefore, urge this Court to dismiss these cases for lack of jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than a decade has passed since this Court's land-mark decision in Roe v. Wade, 410 U.S. 113 (1973) (hereafter Roe) articulated the fundamental constitutional protection of a woman's right to obtain an abortion. In the intervening years, this Court consistently has reaffirmed its position in a succession of cases challenging the practical application of the tenets of Roe.[1] These two cases once more appear to question this Court's strength of conviction in its interpretation of Roe in several

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1/ See Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981).

recent similar decisions.[2] This appearance, however, is deceptive and illusionary. Both of these cases are improperly before this Court. Appellants have failed to satisfy fundamental requirements necessary for the exercise of appellate jurisdiction by this Court.

In Thornburgh, appellants, in their zeal, seek to disrupt the logical and orderly procedural flow of litigation by having this Court abandon the century long practice of restricting review on appeal from a Circuit Court of Appeals decision to only those cases involving final judgements. In addition, because of intervening circumstances, that specific part of the appeal seeking review of the Parental Consent/Judicial Approval provi-

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2/ Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

sions, §3206 of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Am. §§3201-3220 (Purdon 1983) (hereafter the "Pennsylvania Act") presently is moot as a matter of appellate review and ripe for review by the District Court.

Similarly, in Diamond, there is no live case or controversy for the exercise of federal judicial power. Appellants, District Court intervenors, lack the requisite standing necessary to bring the case to this Court. The District Court order granting appellants the right to intervene in the first place is not dispositive of whether they now have standing. None of the originally named party-defendants, governmental officials representing the State of Illinois, have filed an appeal or adopted appellants' brief in this case. In fact, all of the state representatives have been realigned as appellees in the case before this Court.

I. TRADITIONAL PRINCIPLES OF FINALITY OF JUDGMENTS REQUIRE DISMISSAL OF THE APPEAL UNDER 28 U.S.C. §1254(2) OF PART OF AN INTERLOCUTORY ORDER ISSUED BY THE CIRCUIT COURT OF APPEALS IN THORNBURGH

This case was brought to the Circuit Court of Appeals on cross-appeals from a District Court order, entered on a hastily stipulated record, denying a substantial, but not total, part of plaintiff's request for a preliminary injunction of the Pennsylvania Act. The case was twice briefed, as well as orally argued. In between, this Court announced its decisions in three factually similar cases, Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983), Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)and Simopoulos v. Virginia, 462 U.S. 506 (1983). After thoughtful and methodical consideration, the Circuit Court of Appeals finally concluded that certain

sections of the Pennsylania Act were unconstitutional as a matter of law as written. The original denial of the preliminary injunction was reversed in part and the case was remanded to the District Court "for further proceedings in accordance with [its] opinion." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 304 (3rd Cir. 1984). Judgement was not entered for the plaintiffs. Significant parts of the Pennsylvania Act still require District Court review during which both plaintiffs and defendants may engage actively in trial litigation by offering additional evidence and legal arguments. The Commonwealth of Pennsylvania has not appealed certain issues but reserved them for further litigation before the Distict Court. (E.g. §3205(a)(2) of the Pennsylvania Act.) Since the Circuit Court of Appeal's order, plain-

tiffs have renewed their motion before the District Court for a preliminary injunction of additional provisions of the Pennsylvania Act. A full evidentiary hearing has been held and a final hearing on the merits should be scheduled shortly. The District Court decision on these and other matters undoubtedly will be appealed to the Circuit Court of Appeals and, probably, to this Court, as well.

The complicated and fragmented procedural posture of the case, argues in persuasive decibels, that the interlocutory order of the Circuit Court of Appeals clearly lacks the degree of finality required for the exercise by this Court of mandatory appellate jurisdiction under 28 U.S.C. §1254(2) (hereafter §1254(2)).

This Court consistently has required that appeals can be taken only from final judgments of the Circuit Court of Appeals to the United States Supreme Court.

> Under the Act of February 13, 1925 [the Amended Judicial Code of 1925], §240(b) [the predecessor to §1254(2)] appeals to this Court from Circuit Court of Appeals lie only from final judgments or decrees in cases where the validity of a state statute is drawn in question on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is against its validity. (citations omitted)

Slaker v. O'Conner, 278 U.S. 188, 189-190 (1929). This finality requirement was read directly into §1254(2) in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). Neither case has been overruled and clearly are controlling precedent here.[3]

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[3]/Neither New Orleans v. Dukes, 427 U.S. 297 (1976), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), El Paso v. Simmons, 379 U.S. 497 (1964) (per curiam) nor Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77 (1958), reached the merits of the issue presently before the court. In any event, all four cases are factually distinguishable.

It is neither surprising nor confusing that §240(b) of the amended Judicial Code of 1925 and 28 U.S.C. §1254(2) contain no explicit finality language. The final judgement requirement within the federal court system finds its historical roots in the practice of the common law in the courts of England[4] and in the first Judiciary Act of 1789, 1 Stat. 73, c. 20 §22. Finality has been deemed a longstanding rule of procedural practice implicit in all prior acts of Congress, equally silent in their terms on this matter, related to United States Supreme Court appellate jurisdiction. See generally, Crick, The Final Judgement as a Basis for Appeal, 41 Yale L.J. 539 (1932). When the

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4/E.g. Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615); U.S. v. Girault, 52 U.S. 22 (1850); Holcombe v. McKusick, 61 U.S. 552 (1857).

Circuit Courts of Appeal were created by the Evarts Act of March 3, 1891, 26 Stat. 826, this Court reaffirmed in clear and unmistakable terms the applicability of the final judgement requirement for access to the United States Supreme Court by appeal.

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error,... have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 6 How. 201, 204. The Construction [of non-finality] contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed. . . .
> . . .[T]he distribution of the entire appellate jurisdiction of our national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, . . . by designating the classes of cases in respect of which each of those two courts

shall respectively have final jurisdiction. . . . [T]here is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word final . . . should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, ... to this court, independently of any final judgment upon them. The

> effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, ... by awaiting the final judgment, could be promptly decided in one appeal.

McLish v. Roff, 141 U.S.661,665-667 (1891).

§1254(2), as originally enacted as §240(b), was an amendment to the Judge's Bill of 1925 drafted by Justices deeply concerned about the U.S. Supreme Court's caseload. John Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 299 n.7 (Fall, 1978), James F. Blumstein, The Supreme Court's Jurisdiction - Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 898-899 (1973); F. Frankfurter and J. Landis, The Business of the Supreme Court, 273-278 (Johnson Reprint Corp., N.Y. 1972). §240(b) was a Senate compromise measure designed to place circuit courts of

appeal and state courts, pursuant to §237(a), 43 Stat. 937 (now 28 U.S.C. §1257(a)), in "perrect parity, allowing a writ error from the circuit court of appeals under conditions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." Frankfurter and Landis, supra. at 278 (citing Sen. Walsh, 66 Cong. Rec. 2923); see also Simpson, supra. at 313. While §237(a), directed to state courts with varying appellate practices, explicitly required finality, §240(b) merely reflected codification of historical federal court practice.[5]

[5/] This comparison is not intended to imply any other similarity of requirements under these statutes.

The finality requirement, for some time, has served as one of a number of measures aimed at relieving the burden of the Supreme Court caseload by reducing the number of cases requiring mandatory appellate review. Congressional policy has been to restrict the mandatory appellate jurisdiction of the U.S. Supreme Court.[6] This Court has recognized

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[6]/The Evarts Act, Act of March 3, 1891, 26 Stat. 826, established the federal Circuit Courts of Appeal and U.S. Supreme Court certiorari authority over certain cases. The Act of September 6, 1916 Ch. 448, 39 Stat. 726, provided a right of appeal to the U.S. Supreme Court from state court only where a federal statute, treaty, authority or right was struck down or a state statute upheld against federal challenge. The Act of February 13, 1925, Ch. 229, 43 Stat. 936, the Judge's Bill of 1925, widely substituted certiorari review for a significant part of U.S. Supreme Court mandatory appellate jurisdiction. The Act of August 12, 1976, 90 Stat. 1120, by repealing 28 U.S.C. §§ 2281, 2282 and 2403, abolished direct appeals to the United States Supreme Court from most three-judge district courts.

the Congressional policy. Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), Flanagan v. United States, __ U.S. ___, 104 S.Ct. 1051, 1054 (1984) and has followed it strictly when interpreting statutes authorizing appeal, Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 43 (1983). In fact, Congress, this Court, and numerous legal commentators have all pressed for yet further restrictions in the mandatory appellate jurisdiction of the Supreme Court.[7]

To ignore the lack of finality of the Circuit Court of Appeals order before the Court is likely to produce negative consequences beyond the scope of this case. The recent repeal of the three-judge district court statutes was designed to eliminate direct appellate access to the United States

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[7]/See, Simpson, supra. at 298-300, fns. 7-13, for a detailed listing of authorities.

Supreme Court, in cases challenging the Constitutionality of state statutes (Simpson, supra., at 299 fn. 7). Any diminution in the finality requirement under §1254(2), much less a wholesale abandonment of the requirement in this case, certainly would defeat the purpose of the Congressional repeal. Most cases previously heard by three-judge panels would wind up before the U.S. Supreme Court on mandatory appeal. Since many of these cases often involve the grant or denial of interlocutory relief pending the outcome of final litigation, it is not inconceiveable that many of these cases probably would come before this Court more than once.

The appeal in this case also underscores the fact that broader systemic process interests are served by the final judgement rule. By preventing piecemeal U.S. Supreme Court review of discretionary interlocutory orders, disruption and delay of trial court func-

tions, as well as strain on the judicial system and the parties is minimized. Flanagan v. U.S., ___ U.S. ___, 104 S. Ct. 1051, 1054 (1984); Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). This case is a textbook example of piecemeal litigation and all its attendant problems. Aspects of this case can be found at every level of the federal judicial system, virtually insuring that additional issues in this case will be appealed at some future date to this Court. The integrity of the federal judicial system, as well as Congressional intent to restrict mandatory appeals to the U.S. Supreme Court are best served by application of the final judgement rule to dismiss this appeal.

II. THE SUPERVENING ENACTMENT OF PENNSYLVANIA ORPHANS' COURT RULE 16 REQUIRES VACATING, AS MOOT, THE APPEAL FROM THAT PORTION OF THE CIRCUIT COURT OF APPEAL'S ORDER IN THORNBURGH ENJOINING THE ENFORCEMENT OF §3206 OF THE PENNSYLVANIA ABORTION CONTROL ACT ON PARENTAL CONSENT OR JUDICIAL APPROVAL FOR MINORS

The judicial power of the federal courts is limited by the case or controversy requirements of the United States Constitution, Article III §2 (hereafter Article III) and related doctrines of justiciability, such as mootness.

DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (citing Liner v. Jafeo, Inc., 375 U.S. 301, 306 fn. 3 (1964); United States Parole Commission, et al. v. Geraghty, 445 U.S. 388, 395-96 (1980). The mootness doctrine addresses circumstances destroying the justiciability of a case otherwise previously appropriate for determination by a Court. A case or controversy must remain alive

throughout every stage of appellate review. Kremens v. Bartley, 431 U.S. 119, 128 (1977); Preiser v. Newkirk, 422 U.S. 395, 401-404 (1975). Such determinations of justiciability require this Court to review lower court orders on appeal in light of presently existing law not that in effect when judgement was entered. Fusari v. Steinberg, 419 U.S. 379, 388 (1975); Cort v. Ash, 422 U.S. 66, 74-76 (1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972); Hall v. Beals, 396 U.S. 45, 48 (1969); United States v. Alabama, 396 U.S. 602, 604 (1960). A finding of mootness is appropriate when supervening legislation specifically eliminates the original basis for lower court action. Attwell v. Nichols, 608 F.2d 228, 230-231 (5th Cir. 1979), cert. denied 446 U.S. 955 (1980).

The Third Circuit Court of Appeals enjoined the enforcement of §3206 of the

Pennsylvania Act, providing for parental consent or judicial approval for unemancipated minors to obtain an abortion, only until regulations were promulgated containing detailed provisions assuring confidentiality and dispatch. American College of Obstetricians and Gynecologists, et al., v. Thornburgh, et al., 737 F.2d 283, 296-297 (3rd Cir. 1984). On November 26, 1984, the Pennsylvania Supreme Court adopted new rules. Effective immediately, New Pennsylvania Orphans' Court Rule 16 (hereafter Rule 16) provided, inter alia, for confidentiality and dispatch of proceedings under §3206. By its own terms, the Circuit Court of Appeals injunction §3206 then expired. As a consequence, the basis for appellate review also disappeared.

The constitutionality of Rule 16 should not be considered by this Court at this time. The Circuit Court of Appeals clearly stated:

> Although we do not invalidate §3206, its operation should be enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action if still pending, or in some future action, that the regulations are unconstitutional.

American College of Obstetricians and Gynecologists et al., v. Thornburgh et al., 737 F.2d 283, 297 (1984).

No lower court has passed on the question of the constitutionality of Rule 16. The Federal District Court is the appropriate forum for initial review of and judgement on this Rule. Significant portions of this case already currently are pending before that court on remand from the Circuit Court of Appeals. District Court review, therefore, will not unfairly or unreasonably delay final judgement in this case. There presently is no factual record addressing the provisions of the Rule. Nor has either side had a full opportunity to develop legal arguments. This

case is before the Court on the parties' District Court stipulation of uncontested facts submitted on November 30, 1982. Even the Circuit Court of Appeals was not able to review the substantive constitutionality of the Rule by the time its May 31, 1984 order was entered, or when it denied rehearing June 28, 1984.

Rule 16 was not even promulgated until November 26, 1984.

In addition, this Court recently has provided authoritative guidance to District Courts on the very issue of the constitutionality of parental consent provisions. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 476 (1983, Planned Parenthood Association v. Asncroft, 462 U.S. 467 (1983). Application of these and other Supreme Court precedent is not merely a matter of law.

> [t]he Missouri statute upheld in Ashcroft establishing alternative court proceedings for minor consent contained detailed provisions assuring confidentiality and dispatch, establishing a clear and simple procedure for the minor to follow in setting forth her petition, and directing court personnel to assist the minor in preparing the petition. Comparable provisions are absent in the Pennsylvania statute. This difference is critical. To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form.

American College of Obstetricians and Gynecologists et al. v. Thornburgh, et al., 737 F.2d at 297.

The standard disposition in a federal civil case that has become moot pending appeal "is to reverse or vacate the judgement below and remand with a direction to dismiss." United States v. Munsingwear, 340 U.S. 38, 39 and fn. 2 (1950). While that part of the Circuit Court of Appeals order enjoining §3206 should be found moot and

vacated, circumstances clearly warrant further evidentiary consideration of the constitutionality of Rule 16 upon remand to the District Court. See, in accord: United Building and Construction v. Council of Camden, ___ U.S. ___, 104 S.Ct. 1020, 1030 (1984); Hill v. Printing Industries of Gulf Coast, 422 U.S. 937, 938 (1975) (per curiam); White v. Regester, 422 U.S. 935, 936 (1975) (per curiam); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 415 (1972).

III. THE LACK OF AN ARTICLE III §2 LIVE CASE OR CONTROVERSY IN DIAMOND REQUIRES THIS COURT TO DISMISS THE APPEAL

Article III §2 requires a live case or controversy for the exercise of federal judicial power.

> a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such

> that judicial determination is consonant with what was, generally speaking, the business of the... Courts... when the Constitution was framed.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (concurring opinion) (1951); see also, United Steelworkers of America v. U.S., 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring).

Plaintiffs could never have sued appellants, District Court intervenors, in this case. Plaintiffs brought this case under 42 U.S.C. §1983 (hereafter 1983) challenging the constitutionality of the provisions of the Illinois Abortion Law of 1975 as amended, October 30, 1979, S.H.A. Ill. Ch. 38 §81-11 to §81-34 (Smith-Hurd Supp. 1982) (hereafter the Illinois Act). Some form of state action is a prerequisite to asserting and maintaining jurisdiction under §1983. Official actions of representatives of a state, actions in concert with

such representatives or actions under color of state law are required. Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 928-930 (1982); Parratt v. Taylor, 451 U.S. 527, 535 (1981). Review of the appellants' motion in support of their petition to intervene reconfirms that they sought to protect personal and private "professional interest[s] in statutory restrictions on abortion." (Motion to Intervene and Petition for Appointment of Guardian Ad Litem) (hereafter Motion to Intervene). Appellants are not state officials nor have they acted in concert with the state or under color of state law. In fact, appellants have admitted this. They have denied any liability for the amount of attorney's fees awarded to plaintiffs by the District Court (Motion to Amend the Judgement Pursuant to Fed.R.Civ.P. 59(E) at §10) (hereafter Motion to Amend).

The Illinois Act in this case is a criminal statute. It provides for criminal prosecution and/or fines for violation of its terms. S.H.A. Ill ch. 38 §81-26 and §81-31. Criminal statutes can not be enforced by private citizens. Only the state, through its official representatives, may enforce, and by implication, defend a criminal statute. Bordenkircher v. Hayes 434 U.S. 357, 365 (1978); U.S. v. Batchelder, 442 U.S. 113, 125 (1979) The State of Illinois has not appealed the Circuit Court of Appeals judgement to this Court. Nor has the State of Illinois adopted the appellants' brief or jurisdictional statement in this appeal.[8]

This Court's decision in Princeton Univer-

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[8]/See letter dated July 15, 1985 from Michael J. Hayes, Director of Advocacy, State of Illinois Attorney General to Mr. Alexander Stevas, United States Supreme Court Clerk of the Court. The State of Illinois has failed to comply with Supreme Court Rules 10.1-10.4, 10.6 and 34.1 or otherwise conduct itself like a party.

sity v. Schmid, 455 U.S. 100 (1982) is dispositive of the present case. The Court dismissed an appeal by Princeton University of a New Jersey Supreme Court reversal of a criminal trespass conviction. Schmid, a non-student defendant, was convicted of trespass for violating Princeton University regulations on University property. The University was asked to intervene before the New Jersey Supreme Court which then overruled the conviction on First Amendment grounds. The University filed a notice of appeal and a jurisdictional statement. The State of New Jersey joined in the University statement but did not file separately. It filed a brief asking this Court to decide the case but declined to take a position on the merits. The Court concluded that:

> Had the University not been a party to this case in the New Jersey Supreme Court and had the State filed a jurisdictional statement urging reversal, the existence of a case or controversy--and the

jurisdiction in this Court--could not be doubted. However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy. We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. See e.g., Sierra Club v. Morton, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364-1365, 31 L.Ed.2d 636 (1972); Flast v. Cohen, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Thus the presence of the State of New Jersey in this case does not provide a sound jurisdictional basis for undertaking to decide difficult constitutional issues.

Princeton University v. Schmid, 455 U.S. 100, 102 (1982)

See, in accord, City of Chicago v. Rapid Transit Co., 284 U.S. 577, 578 (1931).

In this case the State of Illinois has not even engaged in the minimal level of appellate participation previously found insufficient to invoke this Court's appellate jurisdiction.

Appellants, as private parties, lack the standing necessary to maintain this case. The District Court determination that intervention was appropriate is not conclusive. Standing requirements control whether a litigant is the appropriate party for advancing a particular legal claim. Warth v. Seldin, 422 U.S. 490, 500 (1975); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982); Flast v. Cohen, 392 U.S. 83, 99 (1968). Even if intervention once was appropriate, the constitutional inquiry into the propriety of a party's standing is a jurisdictional issue that may be raised at any time, even on appeal, or by this Court sua sponte. Regents of University of California v. Bakke, 438 U.S. 265, 281 fn. 14 (1978); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260 (1977).

> The constitutional dimension of standing theory, requires, at the very least, that there be an actual injury redressable by the Court.

Director, Office of Worker's Compensation Programs v. Perini North River Assocs., ___ U.S. ___, 103 S.Ct. 634, 640 (1983).

Appellants have no legally cognizable interest in the Illinois Act that should permit them to maintain this appeal. They have not demonstrated any concrete or direct injury from the continued enforcement of the Circuit Court of Appeals injunction of the Illinois Act. At best, appellants' personal and professional convictions may be offended. Similarly, enforcement of the Illinois Act can give appellants only personal gratification. Appellants simply do not have interests in this case significantly distinct from those they share in common with other citizens in the State of Illinois who may want to see the Illinois Act enforced.

Appellants could not have sued the State

of Illinois to compel enforcement of the Act. Private citizens who have no more than an abstract or intellectual interest in the enforcement or nonenforcement of state statutes consistently have been denied standing to sue. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484(1982); Simon v. Eastern Kentucky Welfare Organization, 426 U.S. 26, 40 (1976); Linda R.S. v. Richard D. et al., 410 U.S. 614, 617 (1976); Allen v. Wright, __ U.S. __, 104 S.Ct. 3315, 3325 (1984).

Similarly, criminal defendants regularly have been denied standing to invoke the United States Constitution Fourth Amendment rights of a third party. United States v. Payner, 447 U.S. 727, 731 (1980); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); Rakas v. Illinois, 439 U.S. 128, 141 (1978); Zurcher v. Stanford Daily, 436 U.S. 547, 553

(1978); Brown, et al. v. United States, 411 U.S. 223, 227 (1973).

Recent events merely underscore the inadequacy of appellants' legal interest in maintaining this case before the Court. On April 22, 1985, the District Court held appellants jointly and severally liable to plaintiffs for over $100,000.00 in attorney's fees. Appellants responded by filing a Motion to Amend the Judgement to dismiss the present appellants and name Americans United for Life, Inc. (hereafter AUL) as the sole intervening defendant. In the alternative, they want the court to clarify the original intervention order by stating "that AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." (Motion to Amend at §7). This motion to amend or clarify was based on the discrepency between the original Petition to Intervene in which appellants were named and the District

Court Order to Intervene in which AUL alone was named as intervenor. The Motion acknowledges that the present appellants were solicited by AUL to intervene in this case, but "AUL is the real party in interest." (Motion to Amend at §9). In addition, on June 28, 1985, counsel moved, pursuant to FRCP 25(a) to substitute AUL for appellant, Dr. Jasper Williams, who died in a recent plane crash. This motion presently is under consideration by the District Court. There is little likelihood that the Court will grant either of these motions. In a case challenging the recent additional amendments to the Illinois Act, the Seventh Circuit Court of Appeals affirmed a denial of both mandatory and permissive intervention to an organization similar to the AUL.

> In summary, then, IPC has presented no direct and substantial interest that can be secured by its participation in this lawsuit. Neither its interests as lobbyist, guardian of fetal rights, nor

> potential adoptive parents of adopted fetus "born alive," either separately or together, support its right to intervene in this lawsuit. The district court's finding that IPC failed to establish a significant, legally protectable interest, is, therefore, affirmed.

Keith v. Daley and Illinois Pro-Life Coalition, No. 84-2860, slip op. at 11 (7th Circuit Court of Appeals, June 18, 1985).

The consequences of recognizing the appellants in this case extend beyond the obvious distortion of several doctrines of justiciability. This Court recently has attempted to clarify the parameters of the state action doctrine. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922 (1982); Brooks v. Flagg Brothers., Inc., 436 U.S. 149 (1978); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). These events would be stymied by a decision to review this case on appeal.

CONCLUSION

The Court must not let the urgent and pressing nature of the issues presented in these cases compromise the appellate process. Access to appellate review by this Court is a venerable and precious, but all too fragile, right. We urge the Court to recognize that there is an approprite time and place for every case to be heard. In the present cases, however, it is neither the time, nor, this Court, the place for decision. We urge the Court to dismiss the appeals in both cases for lack of jurisdiction.

Respectfully submitted,

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Nos. 84-495 and 84-1379

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees

EUGENE F. DIAMOND, *et al.*,
Appellants

v.

ALLAN G. CHARLES, *et al.*,
Appellees

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

---

BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Amici American Medical Association, *et al.*, will address the following issues:

1. Whether Pennsylvania impermissibly infringes the woman's right of privacy by requiring her physician to communicate to her a specified litany of information concerning abortions and the abortion procedure.

2. Whether Illinois impermissibly infringes the woman's right of privacy by requiring her physician to inform her that a prescribed method of birth control causes "fetal death."

3. Whether Pennsylvania impermissibly infringes the woman's right of privacy by requiring her physician to disregard the emotional and psychological effects of the abortion technique on the woman and to select the technique that provides the fetus with the greatest chance of survival, even though that technique may pose a greater health risk to the woman.

4. Whether Illinois impermissibly infringes the woman's right of privacy by imposing criminal sanctions on a physician for failure to comply with a vague standard of care to protect a fetus based on either the "possibility" that a fetus is viable or that a fetus is "known to be viable."

5. Whether Pennsylvania's "second-physician" requirement for post-viability abortions contains a sufficiently clear emergency exception to comply with this Court's holding in *Ashcroft* v. *Planned Parenthood*, 462 U.S. 476 (1983).

6. Whether Pennsylvania impermissibly infringes the woman's right of privacy by requiring her physician to supply the State with reports concerning every abortion, which include descriptions of the bases for certain medical judgments.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-495

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees

No. 84-1379

EUGENE F. DIAMOND, *et al.*,
Appellants

v.

ALLAN G. CHARLES, *et al.*,
Appellees

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

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BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

Amici curiae are six major organizations of health care professionals. Each *amicus* shares in common an abiding dedication to promote the public welfare through

the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 234,700 physicians and medical students.

Amicus American Academy of Family Physicians ("AAFP") is a national professional association whose membership includes approximately 56,000 family physicians and medical students. AAFP's purposes include promotion of excellence in health care and in the delivery and care of newborn infants. *Amicus* American Academy of Pediatrics ("AAP") is a nonprofit Pan-American Association of approximately 24,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health.

Amicus Association of American Medical Colleges ("AAMC") is a national professional organization whose membership includes approximately 127 medical schools, 400 teaching hospitals and 76 academic societies in the United States. AAMC's purposes include the advancement of medical education and the improvement of health care in the United States. *Amicus* American Psychiatric Association (APA) is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its 25,000 members represent approximately ninety percent of all ob-

stetricians and gynecologists practicing in the United States.[1]

Amici's interest in these cases stems from their desire to provide medical care of the highest quality, their dedication to good medical practice and their commitment to patients' freedom to seek and obtain needed medical care. To further these interests, physicians must be in a position to discharge their responsibility to provide care and treatment according to their best clinical judgment consistent with professional and ethical standards. *Amici*'s interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion. Indeed, their members hold widely divergent views on these issues, and *amici* take no position on these issues in this brief. *Amici*'s members do, however, share an interest in making certain that, when a patient does seek medical care and treatment, such as an abortion, state laws not impermissibly interfere with the physician's ability to exercise his or her best judgment in carrying out the patient's decision in the manner most suited to the patient's particular health needs.

The provisions of the Pennsylvania and Illinois statutes at issue in these appeals interfere with the exercise of a woman's right to seek and obtain wanted medical care, prevent her physician from exercising his best medical judgment in providing high quality medical care and create serious obstacles to sound medical practice. The outcome of these cases will directly affect the professional services *amici*'s members provide and the patients whom they serve. Accordingly, *amici* wish to present their views concerning the important issues raised in these appeals.[2]

---

[1] ACOG is an appellee in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495, and is filing a separate brief as a party in that appeal. Thus, it is joining this brief only with respect to the appeal in *Diamond* v. *Charles*, No. 84-1379.

[2] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

I.

This Court has long recognized that the individual has a fundamental right, derived in important part from the concept of "liberty" in the Due Process Clause, to make highly personal choices affecting marriage and procreation. More recently, it has held that this right embraces a women's decision whether and how to terminate her pregnancy. Because abortion is a medical procedure, a necessary corollary to the woman's constitutional right to make a decision about terminating her pregnancy is the right to establish and maintain a doctor-patient relationship with a physician. *Roe* v. *Wade*, 410 U.S. 113 (1973); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). Despite the argument of the United States to the contrary, the principle of *stare decisis* requires reaffirmation of this fundamental privacy right, especially in light of *City of Akron*, in which the Court barely two years ago specifically underscored the importance and validity of the right.

In the nearly two dozen related cases handed down since *Roe* v. *Wade*, this Court has given content to the fundamental right by establishing a doctrinal framework which balances the woman's fundamental interest in making a personal medical treatment decision with the state's compelling interest in promoting maternal and fetal health. That framework was clearly articulated by the Court in *City of Akron*. First, the Court has established standards for determining when the fundamental privacy right has been infringed, thus requiring a state to satisfy the compelling interest standard of judicial review. Such infringement occurs when a state law interferes with a woman's decision whether or not to terminate her pregnancy or when a state law interferes with a physician's willingness or ability to enter into a physician-patient relationship with a woman considering an abortion, to

counsel the patient and to provide medically indicated care and treatment. Second, the Court has established a three-part compelling state interest test for laws that do infringe the woman's privacy right: the purpose of the state law must be to advance the state's compelling interests in maternal or fetal health; the specific means chosen must be "reasonably related" to those compelling health goals and thus consistent with sound medical practice; and those specific requirements must be tailored to the state's legitimate goals. In sum, the Court's decisions employ traditional constitutional standards applied in other contexts necessarily modified in this context to balance the privacy right to make a highly personal medical treatment decision against the state's compelling interests in maternal and fetal health.

II.

A. Pennsylvania's informed consent provision is unconstitutional. Although this Court has upheld a basic requirement that the physician must obtain the patient's informed consent, *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67 n.8 (1976), it has held that state attempts to confine the physician's professional discretion as to how best to inform the patient concerning a medical procedure and its consequences infringe the privacy right. *Id.*; *City of Akron*, 462 U.S. at 445. Pennsylvania's compelled disclosures interfere with the physician's judgment and therefore trigger judicial scrutiny under the compelling interest test. The State's mandated disclosures to all patients seeking an abortion are inconsistent with accepted medical standards of individualized physician-patient communication and therefore are unconstitutional.

B. Illinois' "abortifacient" disclosure requirement is unconstitutional. The woman's right in consultation with her physician to employ methods of birth control is clearly part of the right of privacy recognized in *Gris-*

wold v. *Connecticut*, 381 U.S. 479 (1965), *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Roe* v. *Wade*, *supra*. The State of Illinois compels the physician to communicate that a birth control method which interferes with the development of a fertilized egg constitutes "fetal death." This requirement is calculated to, and in fact will, interfere with the patient's decision and with the physician's ability to provide medically relevant information to the patient. Compare *City of Akron*, 462 U.S. at 445. The State has no compelling interest in discouraging women from using birth control methods. Moreover, "fetal death" is not a medically accepted description of the effect of most, if any, birth control techniques. Finally, not every woman needs or wants to have this information supplied to her. *Id.*

C. The Illinois and Pennsylvania fetal treatment provisions are unconstitutional. All three provisions attempt to regulate late abortions which virtually always involve women facing serious health problems. Available abortion methods involve risks, both to the mother and to the fetus. Section 6(4) of the Illinois Abortion Law of 1975 requires the physician to choose the abortion technique that will best protect the fetus without increasing the mother's health risk whenever there is a "possibility" of fetal survival. This provision is unconstitutional under *Colautti* v. *Franklin*, 439 U.S. 379 (1979), and because the requirement is inconsistent with medical practice.

Section 3210(b) of Pennsylvania's 1982 Abortion Control Act requires the physician after the fetus is viable to choose the abortion method most likely to protect the fetus unless that method "significantly" increases the mother's health risk, which is defined expressly *not* to include emotional or psychological health. By preferring the fetus's health over the mother's, and by forcing the physician to disregard certain facets of the mother's condition, Pennsylvania attempts to further its compelling interest in fetal health in ways that this Court already has held are absolutely inconsistent with accepted medical practices. *See, e.g., Colautti* v. *Franklin*, 439 U.S. at 400; *Planned Parenthood* v. *Ashcroft*, 462 U.S. 476, 485 n.8 (1983) (Powell, J.).

Section 6(1) of the Illinois statute requires the physician to choose the abortion method that best protects the fetus's chance of survival, if the fetus is "known to be viable." Although the statute burdens the patient-physician privacy right by regulating the physician's treatment decision at a time of maximum danger to the pregnant woman, the State does seek to further its compelling interest in fetal health. But the State cannot justify this imposition of a general requirement on the physician's exercise of medical judgment in an individual case when he is planning and performing a late pregnancy abortion because such a requirement impermissibly increases the risk to the mother's health.

D. Pennsylvania's "second-physician" requirement for abortions of a viable fetus can only withstand constitutional scrutiny under this Court's decision in *Planned Parenthood* v. *Ashcroft*, if it contains a clear exception for emergency operations. The affirmative defense for medical necessities in Pennsylvania's law is not sufficiently clear to comply with the holding in *Ashcroft*.

E. Pennsylvania's reporting requirement is unconstitutional. Pennsylvania requires physicians to supply it with 14 items of information about each abortion and compels physicians to explain the bases for their medical judgments regarding certain treatment decisions. Some of those requirements are unnecessarily burdensome. *See Planned Parenthood* v. *Danforth*, 428 U.S. at 80-81. Moreover, the State has made no effort to explain concretely how this information is carefully tailored to its interest in promoting maternal health.

ARGUMENT

I. THIS COURT HAS ESTABLISHED A DOCTRINAL FRAMEWORK FOR IMPLEMENTING A WOMAN'S PRIVACY RIGHT TO MAKE A PERSONAL MEDICAL TREATMENT DECISION ABOUT TERMINATION OF A PREGNANCY IN CONSULTATION WITH A PHYSICIAN.

In its brief *amicus curiae*, the United States takes the highly unusual position of asking this Court to overrule a recent decision of the Court interpreting the Constitution—*Roe* v. *Wade*, 410 U.S. 113 (1973). The federal government argues that *Roe* v. *Wade* should be abandoned because the privacy right announced in that case cannot properly be derived from the Constitution and because legal standards for implementing the right do not exist. (U.S. Br. at 20-30.) But a general right of privacy has a long history in the jurisprudence of this nation and this Court, and the specific rights at issue here follow logically from precedents of this Court which the United States itself considers valid. Moreover, as emphasized in this Court's decision in *City of Akron*, this Court has developed a doctrinal framework for implementing a woman's right to make a personal medical treatment decision, in consultation with her physician, relating to procreation. This framework balances the individual's fundamental privacy right with the states' strong interests in maternal and fetal health.[3] Before addressing the specific provi-

[3] *Amici* recognize that reasonable people differ about how to balance the privacy right against the state's interest in maternal and fetal health, and in particular about whether the state has a compelling interest in fetal health before viability. This brief is premised on the fact that this balance has already been struck by the prior decisions of the Court. Given the diversity of views of their members, *amici* neither endorse nor oppose the Court's holding that the state's compelling interest begins at viability. As noted above, *amici's* interest is in ensuring that, when a woman seeks medical treatment, state laws do not impermissibly infringe on the ability of her physician to provide such treatment in the manner best suited to the patient's needs.

sions of state law at issue in these cases, *amici* will briefly discuss these important threshold matters.

A. The Fundamental Privacy Right Arises In The Context Of A Medical Treatment Decision.

1. This Court has long recognized that, as part of the "liberty" protected by the Constitution's Due Process Clauses, the Constitution guarantees to each individual certain areas or zones of privacy which remain free from unjustified government interference or intrusion, although the Constitution itself does not include an express right of privacy. Compare *Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891), with *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). The Court's privacy rulings rest on the theory that the constitutional text does not, on its face, specify all rights that warrant constitutional protection from executive or legislative intervention.[4]

[4] The concept of "liberty" in the Due Process Clause of the Fourteenth Amendment is a "broad" one. *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). For this reason, it has long been recognized as protecting certain personal choices. *See, e.g., Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923). Judicial recognition of an individual's relatively limited right, as part of personal liberty, to be free from unnecessary governmental intrusion because of the private nature of a personal decision hardly can be compared in scope, as the United States attempts to do (U.S. Br. at 29-30), to the judicial activism that marked the era of *Lochner* v. *New York*, 198 U.S. 45 (1905), and its progeny. *See Roe* v. *Wade*, 410 U.S. at 167-171 (Stewart, J., concurring).

Moreover, privacy is hardly the only value that has received constitutional recognition without being expressly specified in the constitutional text. For example, this Court has had little difficulty in deriving a constitutional right to travel. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). In addition, although "federalism" is nowhere mentioned in the Constitution, it is commonly assumed that the doctrine is part of the constitutional scheme and that judicial intervention is warranted if the federal legislative or executive branches intrude into state prerogatives. This Court has recognized as much. *See Coyle* v. *Smith*, 221 U.S. 559, 565 (1911); *Garcia* v. *San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S. Ct. 1005, 1020 (1985).

The essence of the right to privacy is the concept that an individual in certain circumstances has a right to be let alone, *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and that the individual must thus have "independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977). At the core of such a right are matters concerning marriage and procreation; the spectre of governmental agents unnecessarily interfering with such inherently private, individual decisions is antithetical to basic concepts of individual liberty in a free society. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). *See also Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).[5]

2. Building on the precedent of constitutional protection for individual decisions affecting marriage and procreation, this Court in *Roe* v. *Wade* held that the "right of privacy . . . found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state

[5] The United States seems to accept *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), as a legitimate decision on the ground that enforcement of a statute prohibiting the use of contraceptives would require wholly impermissible governmental prying into the private lives of individuals. (U.S. Br. at 20 n.6). Having accepted *Griswold*, however, the government's textual theory (U.S. Br. at 23-28) for rejecting *Roe* v. *Wade* collapses, because this Court did not locate the right recognized in *Griswold* in a specific constitutional provision and could not, as the United States suggests, have located it in the Fourth Amendment alone (because the Amendment guarantees procedural, not substantive, rights). The United States' brief therefore bears "witness that the *right of privacy* which passes for recognition here is a legitimate one." *Griswold*, 381 U.S. at 485 (emphasis added). Once the existence of a constitutional privacy right is, in effect, conceded, the United States' theory reduces to whether unnecessary governmental intrusion into a hospital operating room or a physician's examining room during a medically indicated obstetric or gynecologic procedure or examination is somehow inherently less repugnant than a similar governmental attempt to search a home.

action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As this Court emphasized in *City of Akron*, 462 U.S. at 420 n.1, since *Roe* was decided in January 1973, the Court has affirmed the basic principle that a woman has a "fundamental right" to make the highly personal choice whether or not to terminate her pregnancy. *See, e.g., Connecticut* v. *Menillo*, 423 U.S. 9 (1975); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Harris* v. *McRae*, 448 U.S. 297 (1980); *H.L.* v. *Matheson*, 450 U.S. 398 (1981). Because this Court in *City of Akron* recently applied the *Roe* holding based, in part, on principles of *stare decisis*, there are now "especially compelling reasons" for reaffirming the woman's privacy right to make highly personal medical treatment decisions relating to procreation without unjustified governmental interference. *City of Akron*, 462 U.S. at 420 n.1.[6]

3. Because abortion is "inherently" and "primarily" a medical procedure, *Roe* v. *Wade*, 410 U.S. at 166, a corollary to the constitutional right to make a decision about termination of her pregnancy is the woman's right to establish and maintain a doctor-patient relationship with the physician of her choice. As this Court stated in *City of Akron*, 462 U.S. at 427 (citations omitted; emphasis added):

> [T]he full vindication of the woman's fundamental right necessarily requires that her physician be given

[6] Given the Court's recent adherence to *Roe* v. *Wade*, in express reliance upon principles of *stare decisis*, the United States' request for overruling that case now is particularly curious. It is, in effect, asking this Court not only to reconsider a constitutional precedent 13 years old, but also *City of Akron*, which was handed down barely *two* years ago. Indeed, certain passages of the brief read as if it were an untimely petition for rehearing of *City of Akron*. (U.S. Br. at 16-20.)

> "the room he needs to make his best medical judgment." . . . *The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion.*

The Court has, accordingly, given "consistent recognition" to the "critical role of the physician in the abortion procedure." 462 U.S. at 448 n.39.[7] Indeed, a dominant and recurring theme in this Court's abortion cases is that to effect the woman's constitutional right the physician must have freedom: (a) to enter into a physician-patient relationship; (b) to advise the patient properly; and (c) to perform appropriate medical procedures for her, consistent with accepted medical standards. *City of Akron*, 462 U.S. at 427; *Colautti* v. *Franklin*, 439 U.S. at 387.[8]

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[7] That the woman's right to decide whether to terminate a pregnancy encompasses the right to a physician-patient relationship—indeed takes root in a medical context—is reflected in *Connecticut* v. *Menillo*, 423 U.S. 9, 11 (1975). There the Court held summarily that "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference."

This congruence between the physician's interest in exercising professional judgment on behalf of the patient and the woman's decision whether or how to terminate her pregnancy received concrete recognition in *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976), where a plurality of the Court held that physicians could assert the constitutional rights of their patients. Noting that the physician is "intimately involved" in the abortion decision and that the "woman cannot safely secure an abortion without the aid of a physician," the plurality concluded that "[a]side from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Id.* at 117. *See also Whalen* v. *Roe*, 429 U.S. at 604 n.33.

[8] Thus, in *Roe* itself, the Court described the essential right in terms of the physician's ability to practice medicine on behalf of the woman—the physician, in consultation with the patient, must be "free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy must be terminated" and once the decision to abort is made, the abortion must be performed "free of interference by the State." 410 U.S. at 163. On the same day *Roe* was decided, the Court in *Doe* v. *Bolton*, 410 U.S. 179 (1973), struck down a Georgia state law requiring the approval of a hospital staff abortion committee before a physician could perform an abortion. The Court held that the procedure interfered with the physician's exercise of his best judgment and the physician's "right to administer" medical care. 410 U.S. at 197. *See also id.* at 208 (Burger, C. J., concurring); *Bellotti* v. *Baird*, 443 U.S. 622, 641 (1979).

In *Planned Parenthood* v. *Danforth*, *supra*, the Court analyzed the important role of the physician in consulting with the patient prior to any medical procedure. In upholding a State-imposed requirement that the consultation process must produce at its conclusion a signed, written consent form, the Court expressly recognized that too great an intrusion into the consultation process itself "might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." 428 U.S. at 67 n.8. The Court in *City of Akron* applied the *Danforth* dictum to protect the physician and patient from efforts by the government to intrude into the pre-decision consultation process. In striking down a law requiring the physician to recite a litany of abortion "facts," the Court reasoned: "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." 462 U.S. at 443.

Similarly, once the woman in consultation with her attending physician has decided to undergo an abortion, her privacy right requires that substantial deference be accorded to the judgment of her physician in carrying out that decision. Thus, for instance, the fundamental decision whether a fetus is viable must be "a matter for the judgment of the responsible attending physician." *Planned Parenthood* v. *Danforth*, 428 U.S. at 64; *Colautti* v. *Franklin*, 439 U.S. at 396. And, the procedure of choice recommended by the physician is generally not subject to restriction by the state. 428 U.S. at 78. Ordinarily, the

state's health interests are fully protected by the duty of care the physician owes the patient and the ethical duties demanded by the medical profession. *Doe* v. *Bolton*, 410 U.S. at 199. *See also id.* at 207-208 (Burger, C.J., concurring).[9]

B. State Interference With the Woman's Choice Between Abortion And Childbirth Or With the Woman's Relationship With Her Physician Triggers Searching Judicial Examination Pursuant To The Compelling State Interest Test.

1. Having established that the right to decide whether to terminate a pregnancy, and the correlative right to a physician-patient relationship, is "fundamental" in a constitutional sense, this Court has further held that state "interference" or "infringement" of that right triggers a searching judicial examination pursuant to the compelling state interest test. *Roe* v. *Wade*, 410 U.S. at 155; *City of Akron*, 462 U.S. at 427. The requirement that a state justify "interference" or "infringement" of a fundamental constitutional right under a compelling state interest test is, of course, well-established in constitutional adjudication.[10]

Given the nature of the right, there are two types of infringement which trigger heightened judicial scrutiny. First, infringement occurs when state laws interfere with the *woman's* decisions whether to enter into a physician-

[9] In addition to the woman's right of privacy, physicians, of course, also have an independent right under the Due Process Clause of the Fourteenth Amendment to reasonable notice concerning precisely which of their actions violate the criminal laws of the state. Medicine is not an exact science, and therefore the state must carefully define the scope of criminal liability that it attempts to apply to various aspects of the practice of medicine. *Colautti* v. *Franklin*, 439 U.S. at 392-394. Moreover, criminal liability which is not properly defined may deter physicians from engaging in arguably protected activity to the detriment of the patient. *Id.* at 394.

[10] *See, e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

patient relationship with respect to abortion and whether or not to terminate her pregnancy. This Court has established certain standards for determining whether such an infringement has occurred: when a state abortion law imposes additional health risks on the woman; when a state law attempts to influence the woman's informed choice between abortion or childbirth through the physician-patient relationship; when a state attempts to force the woman to share decision-making authority with a spouse; or when a state law imposes costs on a woman unique to the abortion procedure.[11]

Second, infringement occurs when state laws interfere with a *physician's* willingness or ability to enter into a doctor-patient relationship, to counsel his patient and to provide medically indicated care and treatment.[12] Thus, there is infringement when a state law interferes with a physician's best medical judgment or is otherwise inconsistent with the state of medical knowledge and sound medical practice; when a state law threatens the doctor with sanctions which arise solely from abortion counseling and treatment; or when a state law imposes other burdens on a physician in the abortion context which could deter establishment of a physician-patient relationship or the

[11] See, *e.g.*, additional health risks—*Harris* v. *McRae*, 448 U.S. 297, 328 (1980) (White, J., concurring); influence woman's choice—*City of Akron*, 462 U.S. at 444; share decision-making authority—*Planned Parenthood* v. *Danforth*, 428 U.S. at 69; and costs unique to abortion—*City of Akron*, 462 U.S. at 435, 438, 447.

[12] Examples of how state intrusions operate illustrate pointedly why the privacy right extends both to the woman's decision *and* to the relationship between the patient and physician. Thus, regulations that affect the physician's practice of medicine will very often affect the woman's decision or ability to have an abortion. For instance, if the state declares unlawful the only abortion procedure that would be safe for a particular woman, then the state interferes with the physician's ability to practice medicine according to his best medical judgment and the woman will be effectively denied her right to make a decision whether to have an abortion.

discharge of professional obligations within that relationship.[13]

2. This Court has also held that certain types of governmental actions relating to abortion do not infringe the fundamental privacy right and thus do not trigger the compelling state interest test. First, there are laws which do not subsidize the abortion procedure at levels equal to a state subsidy granted to other medical procedures. The Court has held that refusal to finance an abortion with state or federal money,[14] or to make publicly-financed hospitals available for abortions, does not impose any additional burden either on the woman or her physician. In these circumstances, the woman "suffers no disadvantage" of constitutional significance by the government's refusal to extend benefits to her to which she otherwise can make no claim of Constitutional entitlement. *Maher* v. *Roe*, 432 U.S. 464, 474 (1977); *Harris* v. *McRae*, 448 U.S. 297, 314 (1980). Such a decision not to fund is valid so long as it is rationally-related to a legitimate purpose.[15]

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[13] See, *e.g.*, interference with best medical judgment—*Doe* v. *Bolton*, 410 U.S. at 195-200, *Planned Parenthood* v. *Danforth*, 428 U.S. at 64, *City of Akron*, 462 U.S. at 445, 450; inconsistent with state of medical practice—*Planned Parenthood* v. *Danforth*, 428 U.S. at 63-64, *City of Akron*, 462 U.S. at 448; sanctions solely from abortion role—*Colautti* v. *Franklin*, 439 U.S. at 390, 394, 397; other burdens—*Planned Parenthood* v. *Danforth*, 428 U.S. at 79-80 (record keeping requirement needs justification).

[14] *Harris* v. *McRae*, 448 U.S. 297, 314 (1980); *Williams* v. *Zbaraz*, 448 U.S. 358, 369 (1980); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977).

[15] The United States misinterprets this Court's holdings in the abortion funding cases by relying upon them to support more expansive efforts by the state to regulate the abortion process directly. (U.S. Br. at 3.) The state's interest in favoring birth over abortion is only legitimate when the state's action does not interfere with the privacy right; otherwise, the two interests are mutually exclusive. *See Roe* v. *Wade*, 410 U.S. at 163-164. The state may favor childbirth over abortion in the context of dispensing benefits to which the woman has no constitutional entitlement, without interfering with the fundamental right. But, when it touches the highly personal issue of whether to terminate a pregnancy, such a preference by the state constitutes an infringement of the right. *See City of Akron*, 462 U.S. at 444 n.33.

Second, there are "minor regulations" which "may not *interfere* with physician-patient consultation or with the woman's choice between abortion and childbirth." *City of Akron*, 462 U.S. at 430 (emphasis added). Thus, by definition, a regulation is "minor" as a general matter when it does not "interfere" with or infringe the fundamental right under this Court's standards for determining such infringements. *See* pp. 14-16, *supra*. For example, a state law is "minor" in this constitutional context when it applies equally to abortions and to other medical procedures.[16] Even these "minor" state laws relating to, but not interfering with, the fundamental right must further "important health related state concerns" to be valid. 462 U.S. at 430.

C. The Compelling State Interest Test In The Abortion Context Has Three Distinct Elements All Of Which Must Be Satisfied If An Infringing Law Is To Be Valid.

If a state law infringes a fundamental right, then that law is "presumptively unconstitutional", *Harris* v. *McRae*, 448 U.S. at 312, *quoting Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980), and cannot withstand judicial scrutiny unless the compelling state interest test is met. In the abortion context the compelling state interest test is comprised of three elements: the purpose of the state's law must be to advance the state's "compelling interests" in maternal or fetal health; the specific means chosen must be "reasonably related" to those compelling goals and thus consistent with sound medical practice; and those specific requirements must be carefully tailored to the state's legitimate goals. Under this Court's decisions,

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[16] *See Planned Parenthood* v. *Danforth*, 428 U.S. at 66-67; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 486-490 (Powell, J.); *City of Akron*, 462 U.S. at 420.

failure to satisfy *any* of these elements is fatal to the state's effort to infringe the woman's fundamental right. *City of Akron*, 462 U.S. at 426-431.

In much fundamental rights adjudication, a holding of infringement will doom a law because the state has no constitutionally recognized "compelling interest" in such an infringing enactment. In the abortion context, however, this Court has clearly recogized two "compelling" goals which can justify regulation of the decision whether or not to terminate a pregnancy. Thus, the state may have a compelling interest in protecting the mother's health after the first trimester of a pregnancy.[17] *Roe* v. *Wade*, 410 U.S. at 154, 163; *City of Akron*, 462 U.S. at 428-429. Similarly, at the point of viability, the state has a compelling interest in preserving the potential life of the fetus, so long as the fetus's survival does not pose a threat to the life or health of the mother. *Roe* v. *Wade*, 410 U.S. at 162-163; *City of Akron*, 462 U.S. at 428. *See* note 3, *supra*.

Second, the presence of a compelling purpose does not ensure the constitutionality of the state's particular infringement of the fundamental privacy right. As the Court explained in *City of Akron*, 462 U.S. at 434, "the existence of a compelling state interest in health, however, is only the beginning of the inquiry." Thus, a state's requirements must be "reasonably relate[d]" to the compelling goals. *Roe* v. *Wade*, 410 U.S. at 163; *City of Akron*, 462 U.S. at 434. Typically, this second, "reasonably related" element of the test involves an inquiry into whether the state's requirements are consistent with accepted medical practices. Thus, when the state purports to regulate to further the health of the mother or fetus, it is obliged to adopt measures that have a reasonable medical basis. "The State's discretion to regulate . . . does not, however, permit it to adopt abortion regulations that depart from accepted medical practice." *City of Akron*, 462 U.S. at 431. *See Planned Parenthood* v. *Ashcroft*, 462 U.S. at 487 (Powell, J.); *Planned Parenthood* v. *Danforth*, 428 U.S. at 78.[18] This rule embodies the common sense proposition that, if a state is to further a health related goal, *i.e.* maternal health, it must use accepted medical means in doing so. *See City of Akron*, 462 U.S. at 431.

Third, state laws that interfere with or burden the right must be carefully tailored to the state's objective. *See Roe* v. *Wade*, 410 U.S. at 165; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8; *City of Akron*, 462 U.S. at 438. The law must, in other words, not be overbroad and must, therefore, advance the compelling state interest without any additional and unnecessary interference with the fundamental right. *City of Akron*, 462

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[17] The state's interest in maternal health was held to be compelling at the end of the first trimester in *Roe* v. *Wade* because "mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 163. In *City of Akron*, this Court retained the beginning of the second trimester "as the approximate time at which the State's interest in maternal health becomes sufficiently compelling to justify significant regulation of abortion." 462 U.S. at 429 n.11. But, as noted immediately below, although the state's compelling interest in promoting maternal health begins at the end of the first trimester, a second trimester regulation to achieve that end will only survive judicial scrutiny if it satisfies the second element of the compelling state interest test and is consistent with accepted medical practice. *Id.* (Second trimester regulations must have "reasonable medical basis.")

[18] For instance, in *City of Akron* the Court held that the City's requirement that all second-trimester abortions be performed in a hospital was unconstitutional, because the practices of the medical profession had advanced to the point that such abortions could be performed safely and were being performed routinely in out-patient clinics. The City was therefore obliged to follow the accepted medical practice when it attempted to regulate directly the physician's medical practices in a way that in turn affected the patient's decision whether to seek treatment. 462 U.S. at 437.

U.S. at 438.[19] Thus, for example, the state has a compelling interest in the health of the woman after the first trimester, but in promoting that interest, the state cannot require the abortion to occur only in a hospital, regardless of the patient's condition. *City of Akron*, 462 U.S. at 437. It can, of course, regulate out-patient clinics to ensure that they are capable of responding to complications that might commonly occur. In this way the state protects its interest without undermining the physician's judgment about how best to treat the particular patient.[20]

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This framework established by the Court's abortion decisions is not the product of a series of *ad hoc* judicial responses to specific attempts by some states, often the same ones repeatedly, to regulate various facets of the abortion process. Rather, consistent with sound traditions of constitutional adjudication, the Court has proceeded on a case-by-case basis to define the contours of the right. Its decisions employ the traditional constitutional standards applied in other contexts with necessary modifications made to adjust both to the unique medical context implicated by the personal decision to terminate a pregnancy using *medical* procedures and to the state's compelling interest in maternal and fetal *health*. Although those standards may require the Court to engage in some difficult line drawing within the interstices of the framework, those interstitial judgments are no more

[19] This is also traditionally required when other fundamental rights are infringed by governmental action. *See, e.g., Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

[20] Although the Court in *City of Akron* relied heavily upon the effect of the hospitalization requirement on the woman's ability to afford an abortion, in our view it could also have relied upon the intrusion into the physician's judgment as to the best setting in which to perform the medical procedure.

difficult than the problems posed in applying other constitutional provisions in a modern era. Compare *Katz* v. *United States*, 389 U.S. 347, 352 (1968) (importance of accommodating constitutional guarantees to changing technology). That certain concepts in the Court's framework—for example, maternal health or fetal viability—are defined with reference to contemporary standards of social or medical science is hardly unusual or problematic.[21] Thus, if fetal viability occurs earlier in a pregnancy because of medical advances, then the state's compelling interest in protecting fetal health will simply be triggered sooner. *Cf., City of Akron*, 462 U.S. at 456-457 (O'Connor, J., dissenting).

In sum, this Court's decisions demonstrate that, in the years since *Roe* v. *Wade*, the Court has developed a set of legal standards to guide state and local governments and lower federal courts in deciding where the boundaries of the privacy right lie. That state legislatures may continue to explore the limits of those boundaries is no rea-

[21] In *Addington* v. *Texas*, 441 U.S. 418, 430 (1979), for example, the Court unanimously established the due process standards for involuntary civil commitments based on the state of medical practice at the time. The Court expressly relied upon "practical considerations" arising from the nature of psychiatry in shaping its burden of proof standard. 441 U.S. at 434. Simply because the Court similarly applies standards in the abortion context to take account of "practical" medical considerations does not, *per se*, cast any doubt upon the Court's approach.

In addition, this Court routinely has relied upon social science materials and concepts in resolving complicated constitutional issues in a wide range of cases. *See, e.g., Brown* v. *Board of Education*, 347 U.S. 483, 494 n.11 (1954). Thus, for instance, political science analyses have been utilized in applying the one-person-one-vote principle of the Fourteenth Amendment, *see, e.g., WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 645 n.9 (1964), and economic analysis has been instrumental in deciding commerce clause cases, *see, e.g., Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 378 n.11 (1964).

son to abandon them. Instead, the Court should reaffirm its commitment to the woman's right in consultation with her physician to make fundamental, personal decisions about medical treatment relating to procreation without unjustified governmental interference.

II. THE STATE LAWS AT ISSUE IN THESE APPEALS ARE UNCONSTITUTIONAL.[22]

Application of the Court's doctrinal framework renders the state laws at issue in these cases unconstitutional. Indeed, certain provisions are invalid as directly in conflict with prior holdings of the Court.

A. Pennsylvania's Informed Consent Provisions Are Unconstitutional.

Section 3205 of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3205 (Purdon 1983), lists certain information that the physician must recite to each woman as part of the process of obtaining her informed consent to the aborton procedure. This informa-

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[22] Appellants in both cases raise a number of procedural issues including jurisdiction and mootness. *Amici*, with one exception discussed immediately below, do not address these issues but proceed as if all of the substantive issues are before the Court.

Pennsylvania has presented an issue concerning its parental consent statute for minors seeking abortions. 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983). The court of appeals enjoined enforcement of the provision until the State Supreme Court adopted rules to implement the provision for judicial review of the minor's ability to give consent to the procedure. Pennsylvania's argument in this Court now turns largely on rules recently adopted by its Supreme Court which obviously were not considered by the lower courts. (Pa. Br. at 76-77.) Because the court of appeals' disposition of this issue was clearly correct at the time of the decision, *amici* submit that that decision should be affirmed. *Amici* believe the Court should dispose of this issue without considering the new rules *de novo*; we thus take no position on the constitutionality of those rules.

tion includes, *inter alia:* the fact that the woman may suffer unforeseeable and detrimental physical and psychological consequences from the abortion, the medical risks associated with full-term pregnancy, and the "probable gestational age of the unborn child." The physician or his agent also must inform the mother that, if she carries the child to term, the mother may qualify for state or private financial assistance and would be entitled to child support from the father. § 3205(b).

In addition, the woman must be offered printed materials prepared by the State. 18 Pa. Cons. Stat. Ann. § 3208 (Purdon 1983). The printed materials will describe the developing physical characteristics of the fetus in two-week gestational increments. These materials also must contain a statement that the State "strongly urges" the woman to contact listed agencies offering alternatives to abortion before she consents to the procedure.

1. *Medical Background.* In order to understand how Pennsylvania's informed consent provision interferes with the physician-patient consultation process, it is necessary first to understand how that process works. Consultation is the method of ensuring that each patient gives a knowing and voluntary informed consent to a medical procedure. The doctrine of informed consent is itself rooted in notions of patient autonomy and the uniqueness of each patient's needs. *See, e.g., Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); E. Cassell, Talking With Patients 4-5 (1985); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 Nw. U. L. Rev. 628, 630 (1970). Just as some patients wish to be informed about every conceivable complication, no matter how remote, that may result from a medical procedure, others find such information frightening and would prefer to be spared the details. *See, e.g.*, Laufman, *Surgical Judgment*, in Christopher's Textbook of Surgery 1459 (L. Davis 9th ed. 1968);

Nehemiah, *Psychological Aspects of Surgical Practice*, in Surgery: A Concise Guide to Clinical Practice 9 (G. Nardi & G. Zunidema 3d ed. 1972). As the Court pointed out in *City of Akron*, "it is clear that the needs of patients for information and an opportunity to discuss the abortion decision will vary considerably." 462 U.S. at 448 n.38. *See also Canterbury* v. *Spence*, 464 F.2d at 789; *Sard* v. *Hardy*, 281 Md. 432, 443, 379 A.2d 1014, 1022 (1977).[22]

The informed consent doctrine thus stresses that the degree and kind of information to be conveyed must differ with the patient and the procedure; no universal list of information can provide each patient with proper information. For that reason, the decision about what specific information should be disclosed to the patient must be left to the physician's discretion. *See* 1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 18-39 (1982).

2. *Infringement.* This Court previously considered whether informed consent provisions infringe the woman's fundamental right in *Planned Parenthood* v. *Danforth* and *City of Akron*. The Court in *Planned Parenthood* held that the state's law requiring the physician to obtain a written informed consent form signed by the patient did not infringe the fundamental right. But the Court warned against specific structuring of the informed consent process by the state. 428 U.S. at 67 n.8. In *City of Akron*, the Court found the City's attempt to compel the physician to communicate specific information about abortions and their procedures an interference with the fundamental right.[24] In rejecting the City's attempt to structure the physician-patient dialogue, the Court repeated the warning it had issued in *Danforth* "against placing the physician in . . . an 'undesired and uncomfortable straightjacket.'" 462 U.S. at 445. Thus, this Court has plainly indicated that attempts by the state to dictate precisely what information must be included as part of the consultation process interfere with the privacy right.[25]

[22] For example, when excessive disclosure would result in anxiety, fear, emotional distress or even increased physical pain, physicians may decide in the exercise of their professional judgment to tell their patient no more than she wishes to hear. *See, e.g., Roberts* v. *Wood*, 206 F. Supp. 579, 583 (S.D. Ala. 1962) (disclosure of risks of "a technical nature beyond the patient's understanding" may cause "anxiety, apprehension, and fear . . . [with] a very detrimental effect on some patients"); *Woolley* v. *Henderson*, 418 A.2d 1123, 1130 (Me. 1980) (the doctor must decide "whether disclosure of possible risks may have such an adverse effect on the patient as to jeopardize success of the proposed therapy"; "full disclosure under some circumstances could constitute bad medical practice"); *Cobbs* v. *Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (*en banc*) (a patient has a right to decline to be informed about the risks of a proposed medical procedure). *See generally* J. Katz, Experimentation with Human Beings 540-588 (1972); Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decision-making*, 1979 Wis. L. Rev. 413, 429.

[24] Both Pennsylvania (Pa. Br. at 71) and the United States (U.S. Br. at 8) rely heavily upon the Court's dictum in *City of Akron* that certain required information, such as the fact the woman is pregnant, that she may be eligible for state assistance and the gestational age of the fetus, "certainly is not objectionable." 462 U.S. at 445 n.37. But the Court did not state that it is *constitutional* for the state to interfere with the physician-patient relationship by compelling these or any disclosures. It merely found that these "facts" were not "objectionable," the way other Akron provisions were because these did not discourage a woman from having an abortion. The Court was not required to and did not say that it was going beyond *Danforth* which held only that the state can, without dictating the content of the form, properly require a written consent form signed by the patient.

[25] The State argues (Pa. Br. at 65) that because it did not *intend* to discourage abortions, its provision must be constitutional under *City of Akron*, in which the Court held, *inter alia*, that the City's intent to discourage abortions made its informed consent law unconstitutional. 462 U.S. at 445. The State reads too much into the discussion of intent in *City of Akron*. The Court did not adopt a subjective "intent" test as a necessary element of an infringement

In light of the individualized nature of the consultation process, Pennsylvania's required disclosures strike directly at the protected relationship between the woman and her physician by attempting to structure the dialogue between them. The State seeks to dictate that certain topics and information must be covered in consultation with every patient, regardless of the physician's best judgment. It also forces the physician to act, in effect, as the agent of the State; by emphasizing unforeseen risks of abortions and by recommending that the woman postpone her decision, the physicians are being forced indirectly to encourage all their patients to decide not to have an abortion.[26] Sections 3205 and 3208 are not "minor" obligations that would typically be applied to any other medical procedure. These provisions constitute infringement of the fundamental right because they are an attempt by the State to influence the woman's choice and directly burden the physician's exercise of medical discretion. *See, e.g., Roe* v. *Wade*, 410 U.S. at 165-166; *Singleton* v. *Wulff*, 428 U.S. at 128 (Powell, J.).[27]

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inquiry. It merely found that the City's intent was obvious and unconstitutional. Under the analysis outlined previously, the Court also must focus on the effect of the state's law which plainly interferes with the physician-patient relationship in the pre-decision, consultation process. In any event, by requiring more disclosures concerning the risks of abortion than the risks of childbirth and by requiring the physician to offer material that "strongly urges" the woman to consider postponing her decision, Pennsylvania manifestly intends, just as much as Akron did, to discourage the woman's exercise of her constitutional right.

[26] Instead of using its resources to inform women through a public forum about what state-supported options are available, if the woman chooses to carry her pregnancy to term, or to express generally the State's views concerning childbirth, the State enlists the physician as its agent. Thus, the State improperly manipulates the patient-physician relationship so as to influence the patient's basic decision. *See* note 28, *infra*.

[27] The United States appears to argue (U.S. Br. at 8) that the information requirement is permissible because physicians are free

2. *Compelling Interest Analysis.* To withstand constitutional scrutiny, the State must demonstrate that communication to the patient of State-mandated information is consistent with accepted medical practices and is narrowly tailored to further Pennsylvania's only asserted goal—promotion of maternal health. This it cannot do. In the first place, the State's interest in the mother's health, which could justify the intrusion into the physician-patient relationship, is not compelling until at least after the first trimester. Thus, the required disclosures do not advance any compelling interest prior to that time.

In addition, it is clear that Pennsylvania's informed consent requirement is not reasonably related to maternal health because it is inconsistent with accepted medical practices. As explained previously, good medical practice demands that patient and physician decide together on treatment based on the specific needs of *each* patient. "[E]thically valid consent is a process of shared decisionmaking based upon mutual respect and participation, not a ritual to be equated with reciting . . . the risks of particular treatments." 1 *Making Health Care Decisions* 2; E. Cassell, Talking with Patients 4-5 (1985).[28] *See City of Akron*, 462 U.S. at 448 n.38.

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to supply the patient with any additional, truthful information they wish. But this is no answer to the argument that the State's requirements interfere with the fundamental right. The State has already artificially modified the patient-physician relationship by forcing discussions into directions that, in the physician's judgment, may not be helpful to a particular patient and may affect the trust and confidence of the patient in her physician. Nor does the physician's right to respond justify the infringement. A mere opportunity to undo the damage cannot constitute a compelling interest required to justify the regulation. Moreover, the federal government's argument was at least implicitly rejected by this Court in *City of Akron*; the physicians in that case were equally free to attempt to rebut the "litany" of "facts" required by the City.

[28] Indeed, the recent Presidential Commission indicted such recitations of medical risks as damaging both to the patient and the patient-physician relationship:

Pennsylvania mandates a hollow ritual; among other things, it forces physicians to discuss as a "fact" unforeseeable "detrimental physical and psychological" risks of abortion that they may regard as wholly irrelevant to the patient. Compare *City of Akron*, 462 U.S. at 445.[29] Moreover, this type of disclosure may cause the woman unneeded and unwarranted anxiety about the procedure and thereby serve only to complicate her condition. By discouraging the woman from having an abortion, the required disclosures may also increase her health risks. For these reasons as well, the required disclosure is not reasonably related to the State's goal of promoting maternal health.

It follows, of course, that the Pennsylvania statute also cannot satisfy the "carefully tailored" requirement of the compelling interest test because the State requires all women to receive certain information, regardless of whether it will be medically beneficial to them. In addi-

> . . . Patients' interests are not well served by detailed, technical expositions of facts . . . reciting 'all the facts' in a blunt, insensitive fashion can . . . destroy the communication process, as well as the patient-professional relationship itself. 1 *Making Health Care Decisions* 71.

[29] *City of Akron* undermines the State's heavy reliance upon *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem.*, 428 U.S. 901 (1976), as requiring reversal on the informed consent issue. In the first place, the requirement in the earlier Pennsylvania Act, which still remains in the provision at issue here, that the *physician* must supply certain information to the patient makes the provision plainly unconstitutional under *City of Akron*. Moreover, *City of Akron* provides the appropriate analytical framework for this issue. Not one judge on the Third Circuit in this case, including Judge Adams who wrote the opinion for the court in *Fitzpatrick* on the informed consent issue, even mentioned *Fitzpatrick* as relevant. Instead, all of the judges who wrote below analyzed the issue solely in terms of this Court's plenary decision in *City of Akron*. Accordingly, the Court's summary affirmance, which is in any event entitled to considerably less precedential weight than an opinion on the merits, *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974), is entitled to no weight when it already has been superseded by this Court upon subsequent plenary review of the issue.

tion, the State's *required* disclosures about unforeseeable risks to the woman are "abortion regulations designed to influence the woman's choice between abortion or childbirth" which this Court already has held are not carefully tailored to the State's legitimate goal of promoting maternal health and thus cannot justify the State's intrusion into the physician-patient relationship. *City of Akron*, 462 U.S. at 444. Finally, Section 3205(a) unequivocally requires the *physician* to supply information about health risks, thus preventing other qualified personnel from doing so. This Court in *City of Akron* clearly held that such a requirement is overbroad, 462 U.S. at 447-449, and therefore Section 3205(a) is unconstitutional for this additional reason.

B. Illinois' Informed Consent Provision Is Unconstitutional.

Section 2(10) of the Illinois Abortion Law of 1975, Ill. Rev. Stat. ch. 38, ¶ 81-22(10) (1983), defines "abortifacient" as any instrument, medicine, drug or any substance or device which is known to *cause fetal death* . . . whether or not the fetus is known to exist when such substance or device is employed" (emphasis added). Section 11(d) of the Illinois Abortion Law of 1975, Ill. Rev. Stat. ch. 38, ¶ 81-31(d) (1983), provides:

> Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.[30]

[30] Although the reference to "fetal" death could be interpreted to limit the provision to an ordinary abortion performed during the first trimester, the term "fetus" is defined to include a fertilized egg. Section 2(a) of the Illinois Abortion Act of 1975, Ill. Rev. Stat. ch. 38, ¶ 31-32(g) (1983). Thus, the provision was clearly intended to regulate various forms of birth control.

1. *Medical Background.* There are a variety of artificial methods of birth control, and three of the most common and effective are directly affected by these Illinois provisions. Two methods—the intrauterine device and "the morning-after-pill" (stilbestrol)—are designed to work after fertilization. The former blocks the blastocyst (fertilized egg) from reaching the uterine wall and the latter causes contractions in the uterus that discourage implantation. J. Pritchard & P. MacDonald, Williams Obstetrics 819 (17th ed. 1985); Segal, *Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices*, 44 Fertility and Sterility 214 (1985). The most common and effective birth control is the so-called "pill," which prevents pregnancy primarily by retarding ovulation through the use of hormones. But ovulation is not completely halted by the pill and so fertilization remains a possibility. As an additional set of protections, the pill's hormones also affect the ability of the fertilized egg both to reach the uterus and to implant itself. Mishell, *Control of Human Reproduction: Contraception, Sterilization and Induced Abortion* in Obstetrics and Gynecology 256 (D. Danforth ed. 1982); J. Pritchard & P. MacDonald, Williams Obstetrics 812-813 (17th ed. 1985).

With respect to the definition of "fetus," it is customary to refer to the human conceptus, from fertilization through the first 8 weeks of development, as an *embryo*, and from 8 weeks after ovulation until term, as a *fetus*. J. Pritchard & P. MacDonald, Williams Obstetrics 87 (17th ed. 1985); Kaiser, *Fertilization and the Physiology and Development of Fetus and Placenta*, in Obstetrics and Gynecology 317 (D. Danforth ed. 1982) (setting 11 weeks as the dividing line between embryo and fetus).

2. *Infringement.* Although the abortifacient disclosure requirement does not necessarily implicate a woman's decision whether to have an abortion, it clearly affects the woman's basic ability to make a treatment decision regarding birth control and modifies how the physician can and will consult with the patient. Thus, the law implicates precisely the same core privacy concerns regarding personal decisions about procreation as the laws in *Roe* v. *Wade*, *Griswold* v. *Connecticut*, *and Eisenstadt* v. *Baird*. Thus, under these decisions, the woman clearly has a fundamental privacy right in consultation with her physician to obtain and use an "abortifacient" as defined by Illinois law.

The "abortifacient" provision of Illinois law is obviously designed to, and unquestionably will, intrude into the patient-physician consultation process. The State compels the physician to describe as causing "fetal death" any birth control method which somehow prevents a fertilized egg from becoming implanted in the mother's uterine wall or dislodges the implanted blastocyst. Any effort by the State to dictate precisely what information a physician must convey to the patient involves a direct intrusion into the privacy of the physician-patient relationship. Moreover, by discouraging some women from using birth control, the State increases the health risk to the woman and thereby directly infringes her privacy right. The "risk of dying as the consequence of using an oral contraceptive is certainly less than that imposed by pregnancy and delivery." J. Pritchard & P. MacDonald, Williams Obstetrics 817 (17th ed. 1985).

3. *Compelling Interest Analysis.* Although Section 11(d) primarily regulates the prescription of birth control methods instead of the performance of abortions, the basic framework for evaluating infringements of the woman's privacy right derived from the abortion context applies equally to this provision. Accordingly, Section 11(d) can only be upheld if it is consistent with accepted medical practice and is carefully tailored to serve a compelling state interest. Otherwise this infringement of the woman's fundamental right is unjustified. It is clear that Section 11(d) cannot satisfy these standards. Because

the State did not appeal from the Seventh Circuit's judgment, the Court does not have the benefit of the State's own putative policy justification for enacting Section 11(d). Appellants imply (Br. at 11) that the provision is designed to spare women the trauma of a birth control technique that may cause the non-development or loss of a fertilized egg.

Although the mother's emotional health is unquestionably a legitimate concern to the state (just as it is often a dominant concern to the physician; *see* pp. 38-39, *infra*), it is not compelling unless the health risk the state seeks to prevent is greater than the risk created by compliance with the state's law. *See Roe* v. *Wade*, 410 U.S. at 149; *City of Akron*, 462 U.S. at 435-436. But for those women who forego a birth control method because of the required disclosure, the State's effort plainly increases the health risk to the woman. Moreover, this health risk is far easier to document than the appellants' speculative emotional trauma to a woman caused by nondisclosure of the possible loss of a fertilized egg, which no one can even say ever existed.[31] Thus, the State's interest, which it has chosen not to defend in this appeal, is not a compelling one.

But even assuming the woman's emotional health were a compelling interest of the State in this context, disclosure that invites every patient to believe that she may have an "abortion" if she uses a particular method of birth control is not reasonably related to that goal because it does not comport with accepted medical practices. *Cf.*, Cavanagh & Comas, *Spontaneous Abortion*, in Obstetrics and Gynecology 378 (D. Danforth ed. 1982) (physicians should describe "spontaneous abortion" to patient as "miscarriage" and avoid use of term "abortion" which

[31] *See, e.g.*, Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth: Are The Statistics Biased?*, 248 J.A.M.A. 192 (1982); Rubin, McCarthy, Shelton, Rochat & Terry, *The Risk of Child Bearing Re-Evaluated*, 71 Am. J. Pub. Health 712 (1981).

upsets patients.) As we explained in the context of Pennsylvania's informed consent statute, not every patient requires disclosure of certain information. Moreover, some women will take offense at the State's way of characterizing the birth control process, and may be particularly offended to have such a description coming from the mouth of their personal physician. *See City of Akron*, 462 U.S. at 445.

Nor is the requirement that the physician describe a birth control method in terms of "*fetal death*" consistent with accepted medical practice. As explained, medicine defines a fetus as being at least 8 weeks old, *see* p. 30, *supra*. *See also* Kaiser, *Fertilization and the Physiology and Development of Fetus and Placenta*, in Obstetrics and Gynecology 317 (D. Danforth ed. 1982) (implanted blastocyst is 0.36 x 0.31 mm). Moreover, describing a fertilized egg as having "died" may not be consistent with many physician's concept of death. Compare *City of Akron*, 462 U.S. at 444. Thus, contrary to appellants' claim (Br. at 16), this law does not prevent deception by the physician; instead, it carries a very serious potential for misleading and frightening unsuspecting women.

Finally, Section 11(d) is not a carefully tailored provision. No law that can be fairly construed to discourage every woman from using the most effective methods of available birth control is even rationally related, much less carefully tailored, to the state's legitimate interest in protecting maternal health. Accordingly, this provision is unconstitutional.[32]

[32] There is an additional basis for holding this law unconstitutional. Section 11(d)'s vagueness directly violates the physician's right to due process. If the State chooses to employ its criminal laws to regulate physician-patient relationships, it must act with greater precision than it has here. No person of ordinary intelligence could do anything but guess as to what disclosures are re-

C. The Illinois and Pennsylvania Provisions Which Require Physicians to Use the Abortion Technique That Will Most Likely Preserve Fetal Life are Unconstitutional.

Section 3210(b) of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3210(b) (Purdon 1983), requires the physician who performs an abortion on a fetus known to be viable to use the technique most likely to preserve fetal life unless, in the good-faith judgment of the attending physician, that method would pose a "significantly greater medical risk" to the mother's life or health. The statute expressly excludes potential psychological or emotional effects from the physician's consideration when judging the risk to the woman's life or health. Failure to comply with this section is a third degree felony.

Section 6(4) of the Illinois Abortion Law of 1975, Ill. Rev. Stat. ch. 38, ¶ 81-26(9) (1983), requires a physician who knows that there is a "possibility" of sustained survival by the fetus to employ the same professional skill to preserve the life and health of the fetus that he would be required to exercise toward a fetus intended to be born. Section 6(1) imposes the same requirement of fetal care on the physician, but imposes a harsher criminal penalty if the fetus is "known to be viable." [33]

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quired of him by Section 11(d) in prescribing most birth control methods. *Colautti* v. *Franklin*, 439 U.S. at 400-401.

The claims by the appellants and the United States that the physician "is free to get the message across in any way he chooses" simply highlights the uncertainty of the Illinois law. If the physician knows that the birth control method is an "abortifacient," but attempts "to get the message across" without actually mentioning "fetal death," which is the precise definition contained in the statute, it is not at all clear why a jury could not find that such action constituted a "'reckless" failure to inform the patient that the prescribed method is an abortifacient as statutorily defined. Compare *Colautti* v. *Franklin*, 439 U.S. at 390-394.

[33] The Illinois provisions have been interpreted to require the physician to choose the method of abortion most likely to promote fetal survival. *Wynn* v. *Scott*, 449 F. Supp. 1302, 1321 (N.D. Ill.

1. *Medical Background.* A brief discussion of the medical practices concerning second and third trimester abortions is a necessary backdrop to an analysis of the constitutionality of these laws. "Viability" of the fetus can occur anytime between 22 weeks and 28 weeks after the last menstrual period, although the survival rates for the fetus are "meager" until at least 25 weeks. Hack, Fanaroff & Merkatz, *The Low-Birth-Weight Infant—Evolution of a Changing Outlook*, 301 New Eng. J. Med. 1162, 1164 (1979); Philip, Little, Polivy & Lucey, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122, 124-125 (1981). *See also City of Akron*, 462 U.S. at 457 n.5 (O'Connor, J., dissenting).

There are two primary abortion procedures during the period surrounding viability—saline amnioinfusion and prostaglandin instillation. Both procedures involve injections by the physician into the amniotic sac surrounding the fetus which cause the uterus to contract and the fetus to be discharged. There are, however, two additional common methods of abortion—hysterotomy, which is much like a "mini" cesarean section for childbirth, and dilatation and evacuation ("D&E"), which involves the use of forceps to evacuate the fetus and suction to ensure that the cavity is empty.[34] Like every medical procedure, these techniques carry their own risks for the mother and have their own effects on the fetus.[35]

1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979). In addition, both statutes have been interpreted not to require the physician to increase the "risk to the woman['s health] to save the fetus." 449 F. Supp. at 1321.

[34] Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion 127-128 (G. Berger, W. Brenner & L. Keith eds. 1981); Anderson, Gibson & Hobbins, *Obstetric Management of the High Risk Patient*, in Medical Complications During Pregnancy 102 (G. Burrow & T. Ferris 2d ed. 1982).

[35] To simplify matters, we will focus on the four methods of abortion described in the text because they are the most commonly used. In fact, there are other methods. For example, prostaglandin can

Saline amnioinfusion does create a small risk of hemorrhage and infection to the woman, particularly if the abortion is only partially complete.[36] In addition, if the procedure is done incorrectly and the sodium solution gets into the vascular system, it can cause hypernatremia (an excessive increase in the blood sodium level), which in rare instances can be quite serious and even cause death to the mother.[37] Saline amnioinfusion is contraindicated for women with cardio-vascular disease or severe anemias. R. Bolognese & S. Corson, Interruption of Pregnancy—A Total Patient Approach 126 (1975). Saline amnioinfusion is also very likely to result in fetal death; two scientists reported live births at a rate of much less than one per 100 abortions for this procedure. Stroh & Hinman, *Reported Live Births Following Induced Abortion: Two and One-Half Years' Experience in Upstate New York*, 126 Am. J. Obstetrics & Gynecology 83 (1976).

Use of prostaglandins also carries a small risk of hemorrhage and infection, particularly if the placenta is not

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be administered vaginally or even intravenously; also urea can be used instead of, or with, prostaglandins; and a hysterectomy also has been performed in extraordinary circumstances. *See* Bygdeman, *Prostaglandin Procedures*, in Second Trimester Abortion 89, 95-99 (G. Berger, W. Brenner & L. Keith eds. 1981); Kerenyi, *Intra-Amniotic Techniques*, in Abortion and Sterilization: Medical and Social Aspects 369 (J. Hodgson ed. 1981). Each method, of course, carries different risks to the woman depending on her condition.

[36] Kerenyi, *Hypertonic Saline Instillation*, in Second Trimester Abortion 83 (G. Berger, W. Brenner & L. Keith eds. 1981).

[37] *Id.* It is this risk that may make saline amnioinfusion slightly less safe to the mother than use of prostaglandins. Grimes & Cates, *Complication from Legally-Induced Abortions: A Review*, 34 Obstetrical & Gynecological Surv. 177, 188 (1979). *But see* Bygdeman, *Prostaglandin Procedures*, in Second Trimester Abortion 89, 95-99 (G. Berger, W. Brenner & L. Keith eds. 1981) (indicating that prostaglandin caused both more complications and more major complications than saline amnioinfusion). If the saline injection is properly administered, however, the risk to the mother should be about the same with either procedure.

expelled soon after the fetus.[38] There is, however, no risk of hypernatremia. Prostaglandin instillation does have side effects, such as nausea, vomiting and diarrhea.[39] Use of prostaglandin instillation is not recommended for patients with bronchial asthma, other pulmonary problems, glaucoma or epilepsy.[40] Prostaglandin instillation is also quite likely to cause fetal death, but less so than a saline injection; there can be as many as 3 or 4 live births per 100 abortions. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization 156, 164 (J. Hodgson ed. 1981).[41]

As this Court noted in *City of Akron*, D&E has become the abortion procedure of choice in the early portion of the second trimester. 462 U.S. at 436. But D&E can be used as late as 24 weeks.[42] D&E is generally accepted as

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[38] Kerenyi, *Intra-Amniotic Techniques*, in Abortion and Sterilization: Medical and Social Aspects 359, 367 (J. Hodgson ed. 1981).

[39] *Id.*

[40] Hern, *Mid-Trimester Abortion*, in Obstetrics & Gynecology Ann. 375 (1981); Robins & Surrago, *Alternatives in Mid-Trimester Abortion Induction*, 56 Obstetrics & Gynecology 716 (1980).

[41] *See* American College of Obstetricians & Gynecologists, Tech. Bull. No. 56, *Methods of Midtrimester Abortion* 4 (Dec. 1979); Lee & Baggish, *Live Birth as a Complication of Second Trimester Abortion Induced with Intra-Amniotic Prostaglandin*, 13 Advances in Planned Parenthood 7 (1978); Stubblefield, Noftolin, Frigoletto & Ryan, *Laminaria Augmentation of Intra-Amniotic PGF2 For Midtrimester Pregnancy Termination*, 10 Prostaglandins 413, 420 (1975).

[42] Stubblefield, *Midtrimester Abortion by Curettage Procedures: An Overview*, in Abortion and Sterilization: Medical and Social Aspects 280 (J. Hodgson ed. 1981); Kleiman, *When Abortion Becomes Birth: A Dilemma of Medical Ethics Shaken by New Advances*, N.Y. Times, Feb. 15, 1984, at Bl, col. 1; ACOG, Tech. Bull. No. 56, *Methods of Midtrimester Abortion* (Dec. 1979); Rooks & Cates, *Emotional Impact of D&E* v. *Instillation*, 9 Fam. Plan. Persp. 276-277 (1977). The primary risk caused by later uses of D&E is perforation of the cervix or uterus. Mandelman & Kerenyi, *Medical*

a very safe abortion method and it is also likely to cause the woman much less emotional trouble than the saline amnioinfusion or prostaglandin methods, because it allows the woman to avoid the long and painful labor associated with the other procedures.[43] As the Court pointed out in *Planned Parenthood* v. *Ashcroft*, however, D&E is absolutely fatal to the fetus. 462 U.S. at 483 n.7.

An abdominal hysterotomy is a major surgical procedure and is not accepted as a method of pregnancy termination if any other method is available. J. Pritchard & P. MacDonald, Williams Obstetrics 481-482 (17th ed. 1985). A hysterotomy does no special damage to the fetus, however, and therefore, as a method of pregnancy termination, it provides the greatest likelihood of fetal survival. *See Colautti* v. *Franklin*, 439 U.S. at 398.

2. *Infringement.* Against this background, it is plain that each of the three statutes interferes with the physician's ability to practice medicine on behalf of the patient. With respect to the Pennsylvania law, this Court recognized, even before *Roe* v. *Wade*, *supra*, that the physician's obligation to preserve his patient's health required the physician to consider both the psychological as well as physical well-being of the patient and that judgments concerning both always precede every medical procedure. *United States* v. *Vuitch*, 402 U.S. 62, 72 (1971).[44] Thus, for the State to declare, as Pennsylvania has in enacting

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and Surgical Aspects of Elective Termination, in Rovinsky & Guttmacher's Medical, Surgical and Gynecological Complications of Pregnancy 698 (S. Cherry, R. Berkowitz & N. Kase eds. 1985).

[43] Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion 128 (G. Berger, W. Brenner & L. Keith eds. 1981).

[44] The importance of the physician's ability to consider all health consequences, including emotional and psychological components, has been repeatedly emphasized by the Court since *Roe* v. *Wade*. *See, e.g.*, *Roe* v. *Wade*, 410 U.S. at 153; *Doe* v. *Bolton*, 410 U.S. at 196; *Beal* v. *Doe*, 432 U.S. 438, 442 (1977); *Colautti* v. *Franklin*, 439 U.S. at 400; *H. L.* v. *Matheson*, 450 U.S. at 397-398, 411.

Section 3210(b), that the physician must ignore emotional and psychological considerations strikes at the core of the physician's duty to provide total treatment for the patient.[45]

In addition, the Court already has held that the physician's primary duty must always be to his patient, the woman. *Colautti* v. *Franklin*, 439 U.S. at 400-401. Here Pennsylvania requires the physician to consider primarily the fetus and be concerned about the patient, only if her physical well-being is "significantly" affected. This, of course, directly regulates, and unquestionably burdens, the physician's provision of medical care to the patient.

Both Sections 6(1) and 6(4) of the Illinois law also directly infringe upon the practice of medicine. They impose upon physicians a burden of care toward the fetus that arises at the time of the abortion procedure itself. While the statutes have been interpreted to give primary concern to the mother's health (*see* note 33, *supra*), they nevertheless affect the decisionmaking process at a critical time for the patient and require the physician to follow statutory criteria rather than professional judgment in deciding upon a course of treatment. In addition, all three provisions attach criminal liability to the determination of "viability" which holds great potential for chilling the physician's medical practices. *Colautti* v. *Franklin*, 439 U.S. at 395. Accordingly, all three statutes infringe upon the fundamental privacy right.

3a. *Compelling Interest Analysis.* To withstand constitutional scrutiny, therefore, each provision must be con-

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[45] *See, e.g.*, Mandelman & Kerenyi, *Medical and Surgical Aspects of Elective Terminations*, in Rovinsky & Guttmacher's Medical, Surgical and Gynecological Complications of Pregnancy 698 (S. Cherry, R. Berkowitz & N. Kase eds. 1985); Laufman, *Surgical Judgment*, in Christopher's Textbook of Surgery 1459 (L. Davis 9th ed. 1968); Nehemiah, *Psychological Aspects of Surgical Practice*, in Surgery: A Concise Guide to Clinical Practice 9 (G. Nardi & G. Zunidema 3d ed. 1972).

sistent with accepted medical practice and be carefully tailored to the states' compelling health interests. Under these standards, none of these state laws is constitutional.

On the merits, the Court can summarily dispose of Section 6(4) of the Illinois Abortion Act. The provision is virtually identical to a Pennsylvania statute declared unconstitutional by this Court in *Colautti* v. *Franklin*, 439 U.S. at 379-380. By requiring the physician to take into account the health of the fetus prior to actual viability, the state law seeks to protect fetal life before the State has any compelling interest in that purpose under this Court's prior rulings. *Roe* v. *Wade*, 410 U.S. at 163. Moreover, imposing duties that distract from the care of the woman is not reasonably related to the State's interest in maternal health. Accordingly, the Illinois provision is patently unconstitutional.[46]

b. Pennsylvania's Section 3210(b) is almost as easily disposed of by this Court on the basis of its prior decisions. Although the statute is properly aimed at preserving fetal life after viability, it is not reasonably related to the State's permissible goals because it is not consistent with accepted medical practice. First, the statute eliminates as a legitimate consideration the mother's emotional health. The absolute elimination of emotional considerations invalidates this statute in light of the Court's repeated insistence that "health" requires consideration of everything relevant to a patient's condition. *See* notes 44 and 45, *supra*.

Moreover, it will be very difficult in any given case for the physician in choosing among abortion methods to make

[46] The abortion method of choice for all pre-viability abortions during the second trimester is or is fast becoming D&E because of the advantages of that procedure to the patient. *See* p. 37, *supra*. Accordingly, to the extent Section 6(4) would impose any restriction upon the physician's decision to choose D&E prior to viability, it would be inconsistent with accepted medical practices and therefore unconstitutional for that additional reason.

the "good faith" judgment Section 3210(b) commands. All methods of abortion at this stage of pregnancy carry risks to the mother, and all but one ordinarily cause the fetus to die. Instead of allowing the mother and physician to evaluate these risks and make a judgment about how best to proceed, Pennsylvania *requires* the physician to make the treatment decision on the basis of a trade-off between maternal and fetal health, which this Court has declared impermissible in both *Colautti* v. *Franklin*, 439 U.S. at 400, and *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8 (Powell, J.).

The State's analysis in support of this provision is wholly inadequate. The Pennsylvania Attorney General attempts to rewrite the statute so that the physician is not required to favor fetal health over maternal health. By reading the word "significantly" out of the statute, Pennsylvania attempts to avoid the statute's clear inconsistency with accepted medical practices. *Colautti* v. *Franklin*, 439 U.S. at 400; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8 (Powell, J.). Concededly, the Court has an obligation to avoid unconstitutional constructions of state law. *See, e.g., Planned Parenthood* v. *Danforth*, 428 U.S. at 64; *Bellotti* v. *Baird*, 443 U.S. at 645 & n.25; *H.L.* v. *Matheson*, 450 U.S. at 406, 407 & n.14, 412. Nevertheless, it must give the statute a "fair" interpretation, and reading a word completely out of the statute, as Pennsylvania proposes, violates a fundamental canon of statutory construction. *See, e.g., McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932).[47] Accordingly, Section 3210(b) is unconstitutional.

[47] Even if the Court were to accept the Pennsylvania Attorney General's construction of Section 3210(b), it would not preserve the constitutionality of this provision. As we explain later, any statute that imposes a duty on the physician concerning the life of the fetus will necessarily increase the risk to the woman in violation of the accepted medical practice of first protecting the life and health of the mother. *See* pp. 42-43, *infra*.

c. Although Sections 6(4) and 3210(b) can be readily disposed of on the basis of prior decisions of this Court, Section 6(1) poses the basic issue of whether the State, through its criminal laws, can impose upon the physician, who has decided that a post-viability termination of the woman's pregnancy is *necessary* to her life or health, an independent duty to the fetus that arises during the pregnancy termination process.

Amici submit that the State's intrusion into the physician's exercise of judgment in this situation cannot be justified because the physician's primary duty must be to protect the life and health of the mother. Section 6(1) only applies to terminations of pregnancy after the fetus is believed to be viable.[48] Thus, the termination must be necessary to the mother's life or health. One of the main textbooks in the field lists among the "commonly accepted" conditions that warrant a therapeutic abortion: persistent heart disease, advanced hypertensive vascular disease and invasive carcinoma of the cervix. J. Pritchard & P. MacDonald, Williams Obstetrics 477 (17th ed. 1985); Nesbitt & Abdul-Karim, *Coincidental Disorders Complicating Pregnancy*, in Obstetrics and Gynecology 511 (D. Danforth ed. 1982). Obviously, these are conditions that warrant the physician's immediate and dominant concern. *See* H. Barber & E. Graber, Surgical Disease in Pregnancy 697 (1974) (physician's primary concern must be for the mother who has cancer).

It is irrational—and certainly not tailored to any health concerns—for the State to require the physician to give weight to fetal survival in deciding which of the three most common abortion methods to choose when the

[48] No one can "know" when a fetus is viable. The most that a physician could say is that to "a reasonable medical certainty" a fetus has become viable. We agree with the court of appeals that the failure of the state legislature in *1975* to make clear that the viability determination must be made by the physician is fatal to this provision. *See Colautti* v. *Franklin*, 439 U.S. at 391-393.

mother's health or even life is at such extreme risk. All three common methods are *extremely likely* to cause the death of the fetus. *See* pp. 35-38, *supra*. This Court already has recognized that "[m]any" post-viability abortions will "be emergency operations" in which the physician will have to make a very quick judgment concerning which abortion method to choose in light of the mother's particular life or health threatening condition and the physician's own medical skills. *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 (Powell, J.). As *amici* have already explained, each abortion method carries its own particular risks and those risks must be evaluated in the context of each patient's particular condition. *See* pp. 35-38, *supra*. *Amici* submit that these considerations alone should guide the physician's determination; otherwise, there will always be an increased risk of harm to the mother.

This preference for the mother's health, which this Court has clearly approved, *Colautti* v. *Franklin*, 439 U.S. at 400-401; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 (Powell, J.), is particularly warranted because no abortion method even minimally advances the State's interest in fetal health. Except for a hysterotomy which causes a "significantly" greater risk, however defined, to the mother, all other methods will cause fetal death in almost all cases. The fact that prostaglandin instillation is less likely to cause fetal death than saline amnioinfusion (*Colautti* v. *Franklin*, 439 U.S. at 399) should not mask the much more important fact that both methods are *extremely likely* to result in the death of the fetus. Therefore, it makes no medical sense to inject this consideration as a decisive factor into the physician's calculations in choosing how best to treat a seriously ill woman.[49]

[49] Appellants' facile characterization (Br. at 36, 41) of Section 6(1) utterly ignores all medical reality. They assert that the statute merely imposes a duty on a physician, when all other considerations are equal, to decline to choose an abortion method that is injurious

Amici do not mean to suggest that the State cannot enact laws to serve its compelling interest in the survival of the fetus. The State can protect that interest by requiring the physician who performs an abortion after viability to certify that the abortion was necessary to protect the mother's life or health, *Roe* v. *Wade*, 410 U.S. at 163-164, *and* by requiring hospitals, when appropriate, to take measures, such as use of a second physician, to assist the infant who survives the termination of pregnancy. *Ashcroft*, 462 U.S. at 485-486. These measures are tailored to the State's compelling interest and do not interfere with the physician's judgment at a critical time in the woman's treatment. Because Section 6(1), by contrast, is clearly inconsistent with sound medical practice, it is not reasonably related to the State's permissible health goals and is thus unconstitutional.

D. Pennsylvania's Second-Physician Requirement Must Contain An Exception For Emergency Abortions.

Section 3210(c) of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3210(c) (Purdon 1983), requires the mother's attending physician to arrange for a second physician to be in attendance if the chosen method of abortion "does not preclude the possibility of the child surviving the abortion. . . ." The purpose of the second physician is to take control of the child and become his or her primary provider of care.

In *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485-486, this Court upheld a provision in the Missouri abortion statute that imposed a somewhat similar second-physician requirement. The Court, however, required that the statute contain a clear exception to the requirement of a second physician whenever the abortion was an emergency procedure. When the mother's health is at risk, the

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to the fetus. What this assumes is that all other considerations will be equal. But this is not consistent with medical practice. The physician's concern is and should be with the mother until after the mother's life or health are no longer in jeopardy. *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 (Powell, J.).

attending physician's concern should be exclusively on the mother and not be distracted by the need to obtain a second physician before going ahead with the needed medical care. *Id.* For the reasons stated by the Court in *Ashcroft*, *amici* strongly support the importance of an emergency exception. Thus, Section 3210(c) is only constitutional if the statute somewhere contains a clear emergency exception.

Pennsylvania asserts that the affirmative defense provision in its statute, § 3210(a), which bars conviction if the physician concluded in good faith that the abortion was necessary to preserve the mother's life or health, can be interpreted as an emergency exception to the second-physician requirement. But, Pennsylvania's law is not as clear as Missouri's statute in *Ashcroft*; Section 3210(a) says nothing specifically about the second physician and it is a *defense* to a criminal prosecution for performing an abortion on a post-viable fetus and not part of the second-physician requirement itself. Accordingly, *amici* submit that the court of appeals properly held that the provision was insufficiently clear and thereby correctly required a more carefully drafted emergency exception.

E. Pennsylvania's Abortion Reporting Requirement Is Unconstitutional.

Section 3214 of Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3214 (Purdon 1983), requires every physician who performs an abortion to report certain information to the State. Within a month of the procedure, the physician must submit a report that specifies the referring physician, agency or service; the facility where the abortion was performed; the political subdivision and state in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period; the "probable gestational age of the unborn child"; the type of abortion procedure performed; any complications; the "length and weight of the aborted unborn child when measurable"; the basis for any judg-

ment that the abortion was required because of a medical emergency; and the basis for the physician's determination that the fetus was not viable or that a post-viability abortion was necessary to preserve the mother's life or health. 18 Pa. Cons. Stat. Ann. §§ 3211, 3214 (Purdon 1983). Failure to provide this information is a first degree misdemeanor; in addition, failure to provide information about viability constitutes "unprofessional conduct," and will result in at least a three-month suspension of the physician's medical license.

1. *Infringement.* This Court already has held that a state can require physicians to supply it with routine reports concerning each abortion because such reports ordinarily constitute "minor" regulation of the physician's practices and the reports reasonably further the state's interest in health by providing the state with aggregate data regarding various abortion procedures. *Planned Parenthood* v. *Danforth*, 428 U.S. at 80. But this Court in *Danforth* made clear that such reports could not regulate the physician's judgment or be too burdensome, *id.* at 80-81, and reiterated this point in *City of Akron*, 462 U.S. at 430 n.13 (recordkeeping is permissible "if not abused or overdone. . .").

Amici do not object to reporting requirements if they are restricted to factual material about each abortion which are carefully tailored to a legitimate state goal. Physicians routinely fill out reports for states, such as death certificates and child abuse and drug abuse reports. M. Lewis & C. Warden, Law and Ethics in the Medical Office Including Bioethical Issues 56-58 (1983). Unlike the routine forms required in those contexts, Pennsylvania demands that a physician explain in writing the bases for his judgment about the viability of a fetus and his choice of abortion procedure. These reports are therefore not limited to routine factual materials. Moreover, the physician must supply this information without the slightest idea what use the State may make of it and without being given guidance regarding the level of detail which the State expects or wants.

Thus, the State's requirement seems intended to discourage physicians from performing abortions and will have that effect by requiring them to devote time to drafting reports, under vague criteria, that could better be spent treating patients. J.S. App. at 79a-81a; *Cf.*, *Parham* v. *J.R.*, 442 U.S. 584 (1979) (psychiatrist time better spent practicing medicine than testifying at commitment hearings). In addition, the State's requirement will increase the cost to a woman who has an abortion as opposed to any other medical procedure; the abortion procedure is uniquely burdened by the State's reporting requirement of a physician's professional "judgments."

2. *Compelling Interest Analysis.* Pennsylvania's reporting provision is invalid because it is not carefully tailored to a compelling state interest. The Pennsylvania Attorney General asserts that these reports could be a source of data that could be used for research. (Pa. Br. at 60-61.) But the statute nowhere mentions how these reports will be used by the State, and no legislative history is cited to show that the legislature intended the judgmental portions of the reports to be used for any purpose other than to burden the physician. Nor does the Attorney General attempt to suggest, even in theory, how unstructured answers describing professional judgments underlying a physician's treatment decisions can be used as a data base for serious scientific research by the State or anyone else.

In sum, when a state seeks to force physicians to report on the basis for the exercise of their medical judgment, the state must show that its use of reported information is carefully tailored to the state's interest in maternal health, and Pennsylvania cannot satisfy that requirement because of the vagueness of its requirement and the lack of any rational connection, much less a carefully tailored one, to the state's interest in advancing maternal health.

CONCLUSION

For the reasons stated above, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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